16-118

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~582.~~ ~~[illegible]~~ 54

THE NATIONAL STEAMSHIP COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES H. TUGMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED OCTOBER 11, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 582.

THE NATIONAL STEAMSHIP COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES H. TUGMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	5	2
Remittitur	7	2
Statement of case	9	3
Summons	10	3
Complaint	11	4
Answer	13	5
Petition, &c., to remove cause	22	8
Referee's report	16	5
Judgment (on referee's report)	19	7
Judgment (general term)	104	48
Opinion (general term)	107	49
TESTIMONY FOR PLAINTIFF.		
Charles H. Tugman	21	7
Duncan R. McKenzie	32	13
George W. Carhart	33	13
Samuel DeBow	36	15
George Beedie	50	22
William H. McElhinney	55	24
John C. Gale	59, 72	26, 33
John B. Harris	68	31
S. S. Rowland	73	32
TESTIMONY FOR DEFENDANT.		
Duncan R. McKenzie	77	35
Francis W. J. Hurst	84	39
Oliver J. Geer	86	40

	Original.	Print.
William H. McElhinney	88	41
John D. Keiley	92	43
Godfrey MacDonald	97	45
James J. Nicholson	100	47
Judgment on remittitur	111	51
Opinion of court of appeals	115	52
Bond	123	55
Citation	126	56

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of New York, in the second judicial department, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment, of the plea which is in the said supreme court before you or some of you, on a remittitur from the court of appeals of the State of New York, being the highest court of said State in which a decision in the suit could be had, remitting to you, or some of you, the final decree or judgment of said court to be enforced in the suit between Charles H. Tugman, plaintiff, and the National Steamship Company, defendant, where a right, privilege, and immunity was specially set up and claimed by the said the National Steamship Company, under the Constitution, statutes, and authority of the United States, and the decision was against the right, privilege, and immunity specially set up and claimed under such Constitution, statute, and authority, a mani-

2 fest error hath happened to the great damage of the said the National Steamship Company, as is said and as appears by its complaint: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place before the justices aforesaid on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the fifth day of March, in the

3 year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States, the one hundred and third.

[SEAL.] B. LINCOLN BENEDICT,
Clerk of the Circuit Court of the United States for the Eastern District of New York.

Allowed by—

S. E. CHURCH,
Chief Judge of the Court of Appeals of the State of New York.

(Indorsed:) Supreme Court of the United States. The National Steamship Company, pl'tiff in error, ag'st Charles H. Tugman, d'f't in error. Writ of error. Jno. Chetwood, att'y, pl'tiff in error, 74 B'd'way, N. Y. City. Filed M'ch 6, 1879.

4 Court of appeals, on appeal from the second judicial district.

CHARLES H. TUGMAN, PLAINTIFF AND RESPONDENT,
against
THE NATIONAL STEAMSHIP COMPANY, DEFENDANT AND APPELLANT.

Case and exceptions.

John Chetwood, attorney for defendant and appellant.
S. S. Rowland, attorney for plaintiff and respondent.

5 Supreme court, county of Kings.

STATE OF NEW YORK,
County of Kings, ss:

CHARLES H. TUGMAN, PL'T'FF,
ag'st
THE NATIONAL STEAMSHIP COMPANY, DEF'D.

I, John Delmar, clerk of the supreme court of the State of New York, in the second judicial department, do hereby certify that the following is a true copy of the record and all the proceedings in the above-entitled cause, and all things concerning the same, and that the papers and writings annexed to this certificate are true copies of their respective originals complete, and of the whole thereof on file and remaining of record in my office and that annexed to or included in said record are true and complete copies of the opinions filed in the case.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said supreme court, this 9th day of October, A. D. eighteen hundred and seventy-nine.

[SEAL.] JOHN DELMAR, *Clerk.*

6 Court of appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals held at the capitol, in the city of Albany, on the 11th day of February, in the year of our Lord one thousand eight hundred and seventy-nine, before the judges of said court.

Witness the Hon. Sanford E. Church, chief judge, presiding.

E. O. PERRIN, *Clerk.*

Remittitur, February 11th, 1879.

7 CHARLES H. TUGMAN, RESP'D'T,
ag'st
THE NATIONAL STEAMSHIP COMPANY, APP'L'T.

Be it remembered that on the fourth day of March, in the year of our Lord one thousand eight hundred and seventy-eight, the National Steamship Company, the appellant in this action, came here into the court of appeals, by John Chetwood, its attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York, and Charles H. Tugman, the respondent in said action, afterwards appeared in said court of appeals, by S. S. Rowland, his attorney, which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals having heard this cause argued by Mr. B. C. Chetwood, of counsel for the appellant, and Mr. Freeman I. Fithian, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed.

And it was further ordered and adjudged that the respondent
8 recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect; and hereupon, as well as the notice of appeal and return thereto aforesaid, as the judgment of the court of appeals aforesaid by them given in the premises, are by the said court of appeals remitted to the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

(Signed) E. O. PERRIN.
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, Febr'y 11th, 1879.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals with the papers originally filed therein attached thereto.

[L. S.] (Signed) E. O. PERRIN, *Clerk.*

9 Supreme court, Kings County.

CHARLES H. TUGMAN, PLAINTIFF, RESP'D'T,
ag'st
THE NATIONAL STEAMSHIP COMPANY, DEF'D'T app'l't.

This action was brought by the plaintiff, a citizen and resident of the State of Illinois, against the defendant, a corporation created and existing under the laws of Great Britain, to recover the sum of ten thousand dollars for damages alleged to have been sustained by him by the alleged conversion by defendant of certain moneys of the defendant.

The summons and complaint were served on defendant's agent in New York City, on June 24, 1875.

On July 14, 1875, on the petition and bond of the defendant, an order was made that plaintiff show cause why the action should not be
10 removed into the U. S. circuit court, eastern district of New York, for trial on the ground of defendant's alienage. On July 21, 1875, the motion was argued and an order entered denying the motion to remove with costs. (The motion papers and the order form part of the case.) The defendant answered August 3, 1875.

On January 17, 1877, the cause was called for trial, and was then referred to Henry Nicoll, esq., as referee.

On June 8, 1877, the referee reported in favor of plaintiff for $4,324.53, and judgment was thereupon entered on the 27th day of June, 1877.

The following is a copy of the judgment roll and of the notice of appeal.

N. Y. supreme court, Kings County.

Summons for relief.

CHARLES H. TUGMAN, PL'T'FF,
against
THE NATIONAL STEAMSHIP COMPANY, DEF'D'T.

To the defendant:

You are hereby summoned and required to answer the com-
11 plaint in this action, of which a copy is herewith served upon you,

and to serve a copy of your answer to the said complaint on the subscriber at his office, 157 Broadway, in the city of New York, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated June 23d, 1875.

S. S. ROWLAND,
Pl'ff's Att'y, 155 and 157 B'way.

Supreme court, Kings County.

CHARLES H. TUGMAN
against
THE NATIONAL STEAMSHIP COMPANY.

The plaintiff complains of the defendant and alleges for a cause of action:

1st. That the defendant is a foreign corporation having an office or general manager and a place of business in the city of New York and authorized to sue and be sued, plead and interplead in the courts of this State.

12 2d. That about Octoter 8th, 1874, the defendant, by its duly authorized agent, contracted with Charles H. Tugman, the plaintiff, to carry and safely deliver certain merchandize or freight during the months of December, 1874, and January, 1875, at shipper's option, to wit, one thousand tons from the city of New York to Liverpool, England. That the special rate for such carriage and delivery was agreed between the plaintiff and defendant to be 67½ cents gold for each one hundred pounds of freight.

3d. That in pursuance of the said agreement, the plaintiff contracted to ship and deliver to Fowler Bros., Henry Millward & Co., W. and J. Rogan, Coey and Co., Thomas Kent and others, at Liverpool, England, two millions sixty five thousand two hundred and fifty-two pounds at the rate of eighty seven cents gold for the through carriage for each one hundred pounds, and delivered the said freight to the defendant, and the same was delivered by the defendant to the said consignee in said Liverpool.

4th. That by the defendant's contract with the plaintiff, they were entitled to receive and collect from said consignees for water carriage, 27s. 6d. sterling per ton, or seven thousand nine hundred and forty 45-100 dollars in gold coin, but the said defendant wrongfully and fraudulently collected from the said consignees the sum of eleven thousand nine hundred and sixty-seven 69-100 dollars in gold coin, and misappropriated and converted to the use of the defendant the sum of four thousand and twenty-seven 24-100 dollars in gold coin, the property of this plaintiff, which although the same has been duly demanded of the defendant, yet the defendant refuses to pay over the same.

13 5th. That by reason of said wrongful acts of said defendant, and of the premises, the plaintiff has been compelled to lay out and expend divers large sums of money, and has paid and expended the same, and has been otherwise greatly injured to his damage in the sum of ten thousand dollars.

Wherefore the plaintiff demands judgment in the sum of ten thousand dollars, with interest from January 31, 1875, together with the costs of suit.

S. S. ROWLAND,
Pl'ff's Attorney.

CITY AND COUNTY OF NEW YORK, *ss:*

Charles H. Tugman, on being duly sworn, says he is the plaintiff in this action. That the foregoing complaint therein is true to his knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

CHAS. H. TUGMAN.

Sworn to before me June 23d, 1875.

CHARLES G. CRONIN,
Notary Public, N. Y.

Supreme court

CHARLES H. TUGMAN
against
THE NATIONAL STEAMSHIP COMPANY.

The defendants hereby answer the plaintiff's complaint:

14 They admit their incorporation and that they have a place of business in the city of New York, and a managing agent therein, and they deny generally and specifically each and every material allegation of plaintiff's complaint, not herein expressly admitted, and pray that the same may be dismissed with costs.

JOHN CHETWOOD,
Def'ts Att'y.

CITY AND COUNTY OF NEW YORK, *ss:*

Francis W. J. Hurst, being duly sworn, on his oath says that he is the managing agent in the United States of the defendant; that he has read the foregoing answer, and knows the centents thereof. That the same is true of his own knowledge except as to the matters stated therein on information and belief, and as to those matters he believes it to be true.

F. W. J. HURST.

Sworn to before me this Aug. 3d, 1875.

ADAM GOS,
Notary Public, N. Y. Co.

15 At a term of the supreme court of the State of New York (Kings Co. circuit), held at the court-house, in the city of Brooklyn, on the 17th day of January, A. D. 1877.

Present, Hon. C. E. Pratt, justice.

CHARLES H. TUGMAN, PL'T'FF,
against
THE NATIONAL STEAMSHIP CO., DEF'D'NT.

On the consent of the parties to the above-entitled action,

It is ordered that all the issues therein be referred to Henry Nicoll, esq., counsellor at law, to hear and determine the same.

A copy.

JOHN DELMAR, *Clerk.*

16 Supreme court, Kings County.

CHARLES H. TUGMAN
against
THE NATIONAL STEAMSHIP CO.

I, Henry Nicoll, of the city of New York, to whom by an order made

in this action on the 17th day of January, 1877, all the issues therein were referred to hear and determine the same, do respectfully report to this court, that after hearing the allegations and proofs of the respective parties, I do find as matters of fact that during all the times herein mentioned the defendants were a corporation engaged in the business of transporting merchandize from the port of New York to the port of Liverpool, England.

That on or about the 8th day of October, 1874, the plaintiff and the defendants, and a certain corporation known as the Erie & Pacific Despatch Line, engaged in transporting property from Chicago to New York for hire, by their duly authorized agents, entered into a contract with the plaintiff, whereby it was agreed that the plaintiff should ship, or cause to be shipped on the transportation lines of said parties, one thousand tons of merchandize from the port of Chicago, in the State of Illinois, to the port of Liverpool, in England, during the month of December, 1874, and the month of January, 1875, at such time and
17 in such quantities as the said plaintiff might elect, and that the same should be carried and delivered from said port of Chicago to said port of Liverpool, the said defendants to receive as their proportion of the said freight of said merchandize from the said port of New York to the said port of Liverpool at the rate of thirty one cents gold per one hundred pounds, to be shipped under said contract.

That in pursuance of the said contract, the said plaintiff, during the month of December, 1874, and the month of January, 1875, shipped, and caused to be shipped, from the said port of Chicago to the said port Liverpool two million three thousand three hundred and five pounds (2,003,305) of merchandize by bills of lading, by which the consignee of the merchandize so shipped were to pay on the delivery of the said merchandize at Liverpool aforesaid, for the account of such shipper, at the rate of eighty-seven cents in American gold coin for and on account of the through carriage from Chicago to Liverpool for each one hundred pounds.

That the said merchandize was carried by the defendants under said contracts, and delivered to the consignees in Liverpool, England.

That when the several parcels of merchandize, so shipped as aforesaid, arrived from Chicago at the port of New York, the said defendants received the same, and transported said merchandize to Liverpool, and collected and received from the consignees of said merchandize on the delivery of the same the freight money due on said bills of lading for freight from Chicago to Liverpool, amounting in the whole to the sum of sixteen thousand seven hundred and twenty-eight dollars ($16,728.00) in American gold coin, convertible into currency or legal-tender
18 notes, at the rate of one hundred and ten dollars for each one hundred dollars in gold coin, as provided for in said bills of lading.

That the through freight which the said carriers were entitled under said contract to have and retain for the carriage and delivery of said merchandize, calculated at the rate of 67½ cents per one hundred pounds, amounted to the sum of thirteen thousand five hundred and twenty-two 17–100 dollars in American gold coin as aforesaid, and no more, and the defendants have refused to pay over to the plaintiff the remainder and balance of the said money so collected and retained by said defendants, this being the sum of thirty-three hundred and sixty-six 40–100 dollars in American gold coin, or $3,703.04 in currency as aforesaid.

Upon the foregoing facts, I find as concluions of law:

First. That under the contract aforesaid the defendants were only en-

titled to retain and have for the freight and carriage of the merchandize shipped under said contract, at the rate of 67½ cents per hundred pounds of the said merchandize.

Second. That the said amount of thirty-three hundred and sixty-six 40–100 dollars received by the defendants was so received for and on account of, and to and for the use of the said plaintiff, and that he is entitled to recover the same from the said defendants, or its equivalent in legal-tender notes as aforesaid, being the sum of $3,703.04, with interest from the 20th day of February, 1875, and that the said principal and interest on the date of this my report, amounts to the sum of forty-three hundred and twenty-four 53–100 dollars ($4,324.53) in currency, for which I do direct judgment. Dated New York, June 8th, 1877.

HENRY NICOLL,
Referee.

19 Supreme court, Kings County.

CHARLES H. TUGMAN
against
THE NATIONAL STEAMSHIP CO.

This cause having been referred to Henry Nicoll, esq., to hear and determine the same, and his report having been filed wherein he finds to be due from the defendant to the plaintiff the sum of $4,340.50-100.

Now, on motion of S. S. Rowland, plaintiff's attorney, it is adjudged that the plaintiff do recover of the defendant the said sum of $4,340.50-100 with $652.21-100 costs and disbursements, amounting in the whole to the sum of $4,992.71-100.

20 Supreme court, Kings County.

CHARLES H. TUGMAN, PLAINTIFF,
against
THE NATIONAL STEAMSHIP CO., DEFENDANT.

Take notice that the defendant above named hereof appealed to the general term of the supreme court, to be held in and for the second judicial district, from the judgment rendered in the above-entitled action upon the report of the referee therein, on the 27th day of June, 1877, in the office of the clerk of the county of Kings, in favor of the above-named plaintiff against the said defendant for the sum of $5,172.71-100, which amount was subsequently reduced by the court $180, and from the whole and every part of said judgment.

Dated August 24th, 1877.

JOHN CHETWOOD,
Att'y Def'd't.

To S. S. ROWLAND, Esq.,
Att'y Pl'ff.
JOHN DELMAR, Esq.,
County Clerk.

21 The testimony taken by said referee is as follows:

CHARLES H. TUGMAN, being sworn and examined on his own behalf, testified as follows:

Q. What was your business in October, 1874?

A. Pork-packer and provision dealer.
Q. Where were you engaged in business at that time?
A. Chicago.
Q. Do you know the defendant or any of the defendant's agents?
A. Yes, sir.
Q. State the names.
A. George W. Carhart, in Chicago.
Q. Do you know the business of George W. Carhart in October 1874.
A. He is the general contracting freight agent of the Erie and Pacific line.
Q. Do you know what business relation Mr. Carhart sustained towards the National Steamship Company?
A. He engaged freight for them.
Q. (By the referee.) You had dealt with him in that capacity?
A. Yes, sir.
Q. As a freight agent of the defendant?
A. Yes, sir; and the Erie and Pacific line.
Q. Do you know whether the Erie and Pacific Despatch issued bills of lading?
A. Yes, sir.
Q. Was there any connection apparent on those bills of lading between the Erie and Pacific Despatch and the National Steamship Company?
A. It was on their bill of lading.

22 Defendant's attorney put in the petition, bonds and papers, upon which the removal of this action into the United States circuit court was moved for. Such papers were read, and were as follows:

N. Y. supreme court, Kings County.

CHARLES H. TUGMAN, PL'T'FF,
against
THE NATIONAL STEAMSHIP COMPANY, DEF'T.

To the supreme court of the State of New York:

The petition of the National Steamship Company, the defendants in the above action, respectfully shows:

That an action has been commenced in the N. Y. supreme court against it by Charles H. Tugman, the above-named plaintiff, to recover, as appears by the complaint in said action, a sum exceeding five hundred dollars, exclusive of costs, for damages alleged to have been sustained by plaintiff by the alleged conversion by defendant of certain moneys of the plaintiff.

That the plaintiff in said action at its commencement was and ever since has been and now is a citizen of the State of Illinois.

23 That your petitioner is a corporation created and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, and has its principal offices for the transaction of its business at Liverpool in said Kingdom.

That the meetings of its stockholders and the sessions of its directors are held at Liverpool aforesaid, and its records are kept at and the governing powers of the petitioner acts and issues its orders from said city of Liverpool, wherefore your petitioner is advised and avers that it is a citizen of the said United Kingdom of Great Britain and Ireland, and is an alien to the United States, that it has not designated any person

or persons residing in any county of this State on whom proces' may be served, under the act of the legislature of this State of April 10, 1855.

That your petitioner intends duly to enter its appearance as defendant in said action in this court simultaneously with the presenting of this its petition, and herewith offers a bond with good and sufficient sureties for its entering in the circuit court of the United States for the eastern district of New York, in the second circuit, a copy of the record in said action and for paying all costs that may be awarded by the said circuit court if said court shall hold that said action was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in said action if special bail was originally requisite thereon. Wherefore your petitioner prays that said action may be removed for trial into the next circuit court of the United States—to be held in and for the eastern district of New York, in the second circuit. That this court will accept the surety herewith offered, and proceed no
24 further in said action, and that such further or other order may be made in the premises as may be proper and in conformity with the statute in such case made and provided.

And your petitioner, as in duty bound, will ever pray, etc.

Dated July 13, 1875.

THE NATIONAL STEAMSHIP COMPANY,
Per F. W. J. HURST, *Managing Agent.*

CITY AND COUNTY OF NEW YORK, *ss:*

Francis W. J. Hurst, being duly sworn, on his oath says that he is the managing agent in the United States of the National Steamship Company—the petitioner in the foregoing petition named—and that deponent signed the same as such managing agent, by authority of said company; that deponent has read foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters stated therein on information and belief, and as to those matters he believes it to be true.

F. W. J. HURST.

Sworn to before me this July 13, 1875.

ADAM GOS,
Notary Public, N. Y. Co.

Know all men by these presents that we, Francis W. J. Hurst, of No. 615 Fifth avenue, New York City, and Walter Hodges, of Edgewater, Richmond County, New York, are held and firmly bound unto Charles H. Tugman, in the sum of one thousand dollars, lawful money
25 of the United States of America, to be paid to the said Charles H. Tugman, his executors, administrators or assigns; for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated the thirteenth day of July, A. D. eighteen hundred and seventy-five.

Whereas an action has been commenced in the New York supreme court by the said Charles H. Tugman, against the National Steamship Company, a foreign corporation created and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, and the matters in dispute in said action exceed the sum or value of five hundred dollars, exclusive of costs;

And whereas the said The National Steamship Company are about to present their petition pursuant to the act of Congress in such case made

and provided, for the removal of the said action for trial unto the next circuit court of the United States, to be held in and for the eastern district of New York, in the second circuit:

Now, therefore, the condition of the above obligation is such that if the said The National Steamship Company shall, on the first day of its next session, enter in the said circuit court of the United States to be held in and *and* for the eastern district of New York, in the second circuit, after the removal of the said action thereto, a copy of the record in said action of Charles H. Tugman against it, and pay all costs that may be awarded by the said circuit court if the said court shall hold that said action was wrongfully or improperly removed thereto, and also shall then and there appear in said circuit court and enter special
26 bail in the said cause if special bail was originally requisite therein, then the above obligation shall be void, otherwise the same shall be and remain in full force and virtue.

F. W. J. HURST.
WALTER HODGES.

Sealed and delivered in presence of—
ADAM GOS.

STATE, CITY AND COUNTY OF NEW YORK, *ss:*

Francis W. J. Hurst and Walter Hodges, being duly sworn, on his oath says, each for himself, that he is a resident and householder within the State of New York, and is worth the sum of two thousand dollars, over and above all his debts and liabilities, and property exempt by law from execution, and that he is one of the sureties named in and who executed the foregoing bond.

F. W. J. HURST.
WALTER HODGES.

Sworn to before me this July 13, 1875.

ADAM GOS,
Notary Public, N. Y. Co.

STATE, CITY AND COUNTY OF NEW YORK, *ss:*

On the 13th day of July, A. D. 1875, before me personally appeared F. W. J. Hurst and Walter Hodges, to me known to be the same individuals described in and who executed the foregoing bond, and who severally acknowledged that they executed the same.

ADAM GOS.
Notary Public, N. Y. Co.

27 Supreme court, Kings County.

CHARLES H. TUGMAN, PL'T'FF,
agst.
THE NATIONAL STEAMSHIP COMPANY, DEF'T.

On the petition and bond of the defendant let the plaintiff show cause before one of the justices of this court at chambers thereof, at the court-house in the city of Brooklyn, on the 19th day of July, inst., at 11 o'clock a. m., why the above action should not be removed into the circuit court of the United States for the eastern district of New York, in the second circuit, for trial, and for such further or other order as to the court shall seem just.

Meanwhile and until the hearing and decision of such motion let all proceedings on part of plaintiff be stopped.

July 14, 1875.

J. W. GILBERT.

28 At a special term of the supreme court, held at Brooklyn, Kings County, July 21st, 1875.

Present, Hon. C. E. Pratt, justice.

Supreme court.

CHARLES H. TUGMAN
against
NATIONAL STEAMSHIP COMPANY.

This cause being before me July 21st, 1875, on an order to show cause upon the application of the defendant to remove the said cause into the United States circuit court for trial; upon the petition of F. W. J. Hurst, managing agent of the defendant, and after hearing John Chetwood, counsel for the defendant, in favor of the motion, and S. S. Rowland, counsel for plaintiff, in opposition to the said motion, it is ordered that the said motion be denied with ten dollars costs, to be paid to plaintiff's attorney.

Dated July 21st, 1875.

A copy.

GEO. G. HERMAN,
Clerk.

Which petition, bond, and the two orders were filed in the Kings County clerk's office, on the 21st day of July, 1875.

29 Upon these papers and this petition and bonds, the defendant's attorney insisted that the supreme court was ousted of jurisdiction in this action, and that the referee had no jurisdiction thereof, and no power or authority to proceed therein; that the action was in fact removed into and then pending in the United States circuit court for the eastern district of New York. The referee overruled the objection and ordered the trial to proceed, to which decision and order the defendant's attorney duly excepted, and the trial proceeded notwithstanding the objection of the defendant's attorney.

Q. Now, state what business relation you had with respect to shipping freight to Mr. Carhart.

A. I had previously shipped through Mr. Carhart, by the National line freight, bacon, hams, beef, pork, and lard.

Q. Confine yourself; answer to this shipment in October, 1874.

A. I think it was about the end of October, but Mr. Carhart was on the board of trade, and Mr. Carhart came up and asked me if I felt inclined to engage any freight for the future, and I asked him what freight they were asking, and he says, "I have telegraphed." He says, "What freight do you want?" "I want some freight for December and January." He told me he had telegraphed to Mr. De Bow and got a thousand tons at 27s. 6d. I asked him what line; he said, "the National line." I said, shipper's option; he said, "Yes, I will make it at shipper's option." I said I will take that thousand tons at 27s. 6d. for December and January.

Q. (By the referee.) December, 1874, and January, 1875?

A. Yes, sir; I said, "Let me know now when that is fixed;" he

30 said, "I will make the engagement now with you, I will take it." I said, "I will accept it," and he telegraphed to Mr. De Bow saying that I had got the one thousand tons.

Q. What did you do then?

A. The time came on in December, and freights went up, and provisions went up too, and the Liverpool market was drooping, and did not feel inclined——

(Objected to.)

Q. Don't state what your reasons were, but state the facts what you did.

A. I sold the freight room.

Q. The freight was sent, was it?

A. Yes, sir; it was all shipped before the expiration of the contract.

Q. During what months?

A. The freight was shipped in December and January.

Q. Can you state the amount?

A. I made out about 1,100 tons altogether.

Q. I mean under the contract you shipped some other freight not embraced in it?

A. I shipped 65 tons of my own freight.

Q. (By defendant's attorney.) 65 tons of your own freight under this contract?

A. Yes, sir.

Q. And the other freight was whose?

A. Melwood & Melwood & Co., Fowler Brothers, Coey & Co., William Kirkwood, W. &. J. Rogan, and myself.

Q. Can you give the aggregate amount of freight which you shipped?

A. The aggregate of freight is not weighed there, but we can always arrive within 10 or 12 pounds of the weight of a box or within 5 or 10 pounds of the tierce of lard.

Q. (Repeated).

31 A. Within 1,100, judging by the quantity of stuff shipped only the freight was 935 tons—taking the 65 tons off.

Q. (By the referee.) All but 65 tons were furnished by friends of yours?

A. Yes, sir; at the advanced rate.

Q. Do you know the exact amount of tonnage for which you claim to recover this 19½ cents?

A. I claim on 935 tons.

Q. Have you figured the amounts? Have you made the computation what that amounts to?

A. 935 tons is 20,944 cwt., at 19½ cents per hundred pounds, $4,084.08; premium on gold then was 13¼.

Q. What was the amount of primage?

A. $204.

Q. Did you make a demand on the company for the payment of this freight money?

A. Yes, sir.

Q. (By defendant's attorney.) You did?

A. No; I was in Chicago.

Q. What did you do about collecting the freight money?

A. They generally paid the difference to us here.

Q. That is hardly testimony. What did you do? State what took place on your part, and with whom, with regard to collecting this money of the company.

A. I gave it to the Erie and Pacific Despatch to collect.

Q. What return did they make to you?

A. They said Mr. Hurst would not pay.

Q. (By the referee.) What was the amount of your demand?

A. $4,084.

Q. That was the 19 cents advanced over and above the freight?

A. Yes, sir.

Q. (By plaintiff's attorney.) Well, what returns did the Erie and Pacific Despatch make?

32 A. The Erie & Pacific Despatch said that they had called to see Mr. Hurst several times, and he had finally concluded not to pay at all, and if I wanted to collect my money, I should come down to New York and commence legal proceedings.

Q. Who is Mr. Hurst?

A. He is the managing man of the National line in New York.

DUNCAN R. MCKENZIE, being sworn and examined on behalf of the plaintiff, testified as follows:

Q. What is your business?

A. I am freight clerk for the National Steamship Co.

Q. Were you in the same occupation in October, 1874?

A. I was.

Q. And have so continued up to this time?

A. Yes, sir.

Q. Do you know anything about a freight contract between the Erie and Pacific Despatch and the National Steamship Co. on the part of Charles H. Tugman?

A. No.

Q. Will you state what the book now offered to you is?

A. It is a book in which I kept memorandum of freight engagements.

Q. Have you any memorandum on that book of a shipment of 1,000 tons of freight in October, 1874, made through the Erie & Pacific Despatch?

A. I have.

Q. Will you point out the memorandum?

A. (After looking to the book.) There it is.

Q. Will you explain that memorandum as it there appears; state what it is?

A. It is dated October 8, 1874, Chicago; it is the place where the freight was to come from.

33 Q. Give us the transcript.

A. Chicago, E. & P. D., 1,000 tons bacon, &c., December and January, 27s. 6d.

Q. (By the referee.) It was entered by you in the book kept by you as freight agent of this company?

A. Yes, sir.

Q. Do you know if that freight was shipped?

A. To the best of my knowledge it was.

Cross-examination waived.

GEORGE W. CARHART, being duly sworn and examined on behalf of the plaintiff, testified as follows:

Q. What was your business in October, 1874?

A. Agent of the Erie and Pacific Despatch.

Q. Did you have at that time any business relation with the National Steamship Company?

A. We issued a joint bill of lading.

Q. Were you authorized to sign the bill of lading?
A. Yes, sir.
Q. By whom?
A. Mr. De Bow.
Q. Who is Mr. De Bow?
A. He was president of the Erie and Pacific Despatch.
Q. Did you make any contract with Tugman in October, 1874, for the shipment of any freight to Liverpool?
A. Yes, sir.
Q. (By defendant's attorney.) Is it reduced to writing?
A. No, sir.
Q. (By the referee.) Made it in Chicago?
A. Yes, sir.
Q. State what the contract was.
34 A. It was a thousand tons of hog product to be shipped by the National Steamship Company in December and January.
Q. At what rate?
A. At 27s. 6d.; ocean rate.
Q. (By the referee.) Currency or gold?
A. Gold rate.
Q. Do you know whether the freight was shipped?
A. Yes, sir.
Q. Do you know how it was shipped?
A. It was shipped by the Erie and Pacific Despatch.
Q. To New York?
A. Yes, sir.
Q. Were bills of lading made out?
A. Yes, sir.
Q. Were those bills of lading signed by you?
A. Yes, sir.
Q. Were they inland bills of lading or through bills of lading?
A. Through bills of lading.
Q. (By the referee.) What was the rates expressed in those bills?
A. They were different rates expressed in the bills.
DEFENDANT'S ATTORNEY. I object to any evidence of the bills of lading, and I call for their production.

Cross-examination:

Q. Was any part of this freight shipped by Mr. Tugman himself?
A. Yes, sir.
Q. What part of it?
A. Really, I could not say now, sir; we have our bill of lading book with the impression of all the bills of lading.
35 Q. Can you give any approximate idea what proportion of this freight was shipped by Mr. Tugman himself?
A. No, I cannot, not correctly. I would not like to approximate.
(By the referee.) There was some freight shipped not in his name?
A. No, sir.
Q. How do you know that freight was to apply on his contract?
A. By Mr. Tugman's orders.
Q. Then these order shipments you made by his orders?
A. Yes, sir.
Q. (By defendant's attorney.) Was there as much as 100 tons of freight shipped by himself?
A. I could not say.
Q. Did he ship as much as 500 tons himself personally?
A. I should think not.

Q. Did he ship as much as 400?
A. I don't think he did?
Q. Did he ship as much as 300?
A. I don't know; we could give you the exact amount.
Q. Under whose instructions did you make that contract with Mr. Tugman?
A. Let me answer that question in my own way. To go back—I telegraphed Mr. De Bow for this rate, and Mr. De Bow wired me he would take it at 27s. 6d.
Q. Can you tell me exactly what you telegraphed to Mr. De Bow?
A. The sum and substance of it was, what will you take for 1,000 tons of hog product to be shipped in December and January—steam to Liverpool, and his answer was 27s. 6d.
Q. And it was upon that that you made the bargain which you have stated with Mr. Tugman?
36 A. Yes, sir. Then I wired Mr. De Bow, I have closed for 1,000 tons of provisions, with steam to Liverpool, for 27s. 6d., to be shipped in December and January.

Redirect:

Q. "There was some freight shipped not in his name" (meaning plaintiff), the answer is "no, sir," that should be "yes, sir." Do you wish to correct your answer?
A. Yes, sir—I wish to say "yes, sir" instead of "no, sir." I must have misunderstood the question.
Q. (By the referee.) You are satisfied you ought to have answered it "yes, sir"?
A. Yes, sir.

SAMUEL DE BOW, being sworn and examined on behalf of the plaintiff, testified as follows:

Q. What was your business in October, 1874?
A. I was president of the Erie & Pacific Despatch Company.
Q. Do you know the plaintiff, Charles H. Tugman, and the defendant, the National Steamship Company, in this city?
A. I do, sir.
Q. What business relations, if any, did you have with them?
A. As representing the Erie Railway we had a joint bill of lading with the National Steamship Company.
Q. What do you mean by a joint bill of lading?
A. We had a recognized bill of lading with authority to engage freight.
(Objected to as describing the bill of lading.)
Q. (By the referee.) State as near as you can the fact. State what was the arrangement.
(No answer.)
37 Q. What was the business of the Erie and Pacific Despatch?
A. To carry freight for the Erie Railway Company and connections.
Q. What was the business of the National Steamship Company?
A. They are a steamship company, managed by Mr. Hurst, to get all the money they can out of freight, I presume.
Q. What did they do? Where did they carry over to—Liverpool?
A. Liverpool and London.
Q. Now state what connection, if any, you had with the plaintiff with

regard to freighting by means of the Erie & Pacific Despatch and the National Steamship Company, in October, 1874.

DEFENDANT'S ATTORNEY. How was that arrangement expressed, in writing or verbally, between you and the plaintiff?

PLAINTIFF'S ATTORNEY. You mean for issuing these joint bills of lading.

DEFENDANT'S ATTORNEY. I want to know how that arrangement was expressed?

A. We had no arrangement with Mr. Tugman.

Q. Now state what took place between you and the National Steamship Company in October, 1874, in relation to shipping freight for Mr. Tugman from Chicago to Liverpool.

WITNESS. The fact just as it occurred?

PLAINTIFF'S ATTORNEY. Yes.

38 A. I got a dispatch from Mr. Carhart.

Q. You need not tell what the dispatch contained. Then you did something; now tell what you did.

The REFEREE. Who did you get a dispatch from?

WITNESS. Mr. Carhart.

Q. What did you do with the dispatch?

A. Took it down to Mr. McKenzie, Mr. Hurst's agent.

Q. You presented this dispatch to Mr. McKenzie?

A. Yes, sir.

Q. Now give it word for word.

A. This dispatch offered so much freight, a thousand tons of freight, at 27s. 6d., and I asked Mr. McKenzie ——

Q. (By the referee.) Did you read the dispatch to Mr. McKenzie? Did you show him the dispatch?

A. Yes, sir.

Q. You showed the dispatch to Mr. McKenzie?

A. Yes, sir.

DEFENDANT'S ATTORNEY. I object to the contents of the dispatch until the dispatch itself is produced.

Q. Who read the dispatch, Mr. McKenzie?

A. Yes, sir.

Q. Now go on and state what took place between you and Mr. McKenzie.

A. He said he would accept it, and he entered it upon his book, and it's there yet.

Q. State what it was he would accept.

A. 27s. 6d.

Q. For what?

A. I think it was December, January, and February delivery—a thousand tons of freight—long tons.

39 Q. To be carried from where to where?

A. New York to Liverpool.

Q. Did it state who was to furnish this freight?

A. I don't know. Mr. Hurst knows that.

Q. From whom was this freight to be sent, do you know? Do you know who you got this request from?

A. From my agent in Chicago.

Q. Who was your agent in Chicago?

A. George W. Carhart.

Q. You stated that you had some arrangement with them for joint bills of lading; now, we want you to tell who you made that arrange-

ment with, and when and what that arrangement was, just as if you were going to make it again?

A. Long before I came to New York the Great Western Despatch Co. had a joint bill of lading with the National Steam Co.

(Objected to as immaterial and irrelavent; objection overruled; defendant excepted.)

It became necessary in the furtherance of my business that I should have a through connection; the Great Western Despatch at the time was a trade mark of the Erie Railway, and so was my line, the Erie Railway, being responsible for both of us and all of us. I met Mr. McKenzie under favorable auspices, being introduced by a mutual friend at the Produce Exchange, and asked him if we could make a through bill of lading with his line.

(Defendant's attorney again objected to this evidence as immaterial and irrelavent; objection overruled and defendant excepted.)

40 A. He said he would let me know within a few days; in a few days he would let me know, and I got a bill of lading printed and did business for two or three years before this transaction.

Q. Prior to this time, this conversation, had you any business relations with the National Steamship Co. at all?

A. Yes, sir.

Q. State when this was.

A. I don't know; I cannot tell unless you show me bills of lading.

Q. (By the referee.) Was it two or three years before, or five, or what, when you saw Mr. McKenzie on the Produce Exchange?

A. In the first place, I did not see Mr. McKenzie on the Produce Exchange; I saw him mutually.

Q. When was this?

A. Just approximate?

Q. Of course.

A. Anywhere from 1872 to 1874.

Q. You cannot get any nearer now?

A. No, sir.

Q. Not later than 1874, and you do not think it was earlier than 1872?

A. No.

Q. In what time of 1874 did it occur, if it took place in 1874, that you made this arrangement?

A. If it took place in 1874, the arrangement was made to cover shipments from Chicago; I won't be certain on November, but in November, December, January, and February.

Q. We want to know when you made this arrangement to issue through bills of lading with the National Steamship Co., without any reference to this transaction at all. Was it three or four years before this transaction?

A. I will swear it was two years before this transaction.

41 Q. Now does that arrangement continue still?

A. Yes, sir.

Q. And during all this time you have been shipping freight and issuing through bills of lading under this arrangement?

A. I am only agent of the Erie Road.

Q. Do you know that that business has been going on?

A. Yes, sir.

Q. And you have continued issuing those joint bills of lading from the time that arrangement was made up to the present time?

A. The Erie Railway have through their agencies.

(Objected to as immaterial and irrelevant; objection overruled; defendant excepted.)

Q. Do you know of Mr. Tugman's shipping any freight over your line during the months of December, 1874, and January, 1875?

A. Personally, Tugman?

Q. Yes.

A. Yes, sir; I believe he did. I know he did.

Q. Now state, if you are able to, what you had to do with the shipment of that freight.

A. I got a dispatch from George Carhart, in Chicago, asking me—— (Objected to.)

Q. What did you do when you got that dispatch?

A. Took it to Mr. McKenzie and asked him if he would take it, and he said he would. I don't know Mr. Tugman personally.

42 Q. You had some conversation with Mr. McKenzie; at the time you received this telegram you went and saw Mr. McKenzie?

A. I handed Mr. McKenzie the telegram.

Q. You had some conversation with him; what was the conversation you had with him?

A. Asked him if he would take that 1,000 tons of freight at 27s. 6d., according to the terms of that dispatch.

Q. What did he say?

A. He said he would, and entered it on his books.

Q. Then what did you do in regard to this dispatch business?

A. I sent a telegram to Carhart at Chicago.

Q. What next took place in reference to this transaction; did the freight go forward?

A. Yes, sir.

Q. By way of the Erie & Pacific Dispatch?

A. Yes, sir.

Q. What did you do with it?

A. Gave it to the National Steamship Co.

Q. Do you know about how much?

A. Approximating to the contract, I guess there is no question about it; I guess we gave them all they wanted; we gave them nearly a thousand tons; it may have been over a thousand tons; we carried out our contract with the National Steamship Co.

Q. Did they pay you the inland freight?

A. They paid the Erie Railway; yes.

Q. Through you?

A. Yes, sir; the Erie & Pacific Despatch.

Q. Do you know about what time they paid the inland freight, how long after the shipments?

A. I think their settling days were each Thursday; we are still doing business with them on the same terms; I think we settled each Thursday.

43 Q. You don't know at what time they paid this inland freight?

A. They paid it promptly in the usual course of business.

Q. What I want to get at is whether the freight is paid here before it is collected?

A. They paid it in the regular course of business; you mean the National Line or Inman Co., or any of them?

Q. Yes.

A. They took their 21s. 6d. out of the through rate, and kept the balance of the money.

Q. I want to know when they paid you upon inland freight with ref-

erence to the delivery of the goods to them; whether it was after they had taken it to Liverpool or whether they advanced it to you?

A. They paid it every Thursday.

Q. They advanced it to you?

A. Yes; our proportion.

Q. Do you know what your proportion was?

A. On this through rates?

Q. Yes.

A. It was the Erie Railway earnings.

Cross-examination:

Q. How do you personally know that this particular lot of goods came over the Erie & Pacific Despatch?

A. I got the way-bill of them.

Q. Are the way-bills in your possession?

A. They ought to be around here somewhere. I furnished duplicates of them.

Q. Your only knowledge is, you saw some way-bills?

A. No; my knowledge is very complete on it, because I know all about it.

Q. How do you know? Go on and tell all you know.

44 A. I got the billing from the time they were delivered at Chicago until they were delivered to Mr. Hurst.

Q. Did you ever see these goods yourself?

A. Do you mean can I identify each box of bacon?

Q. Did you see these goods yourself?

A. I guess I have seen some of them. We had 20,000 boxes of bacon on the dock at one time, and I guess they were among them.

Q. You don't know whether you ever saw these goods or not?

A. I guess I will have to say no.

Q. The only knowledge you have of the shipment of these goods is by papers that were handed you?

A. I must say that I have not a photograph of the goods.

Q. You don't know anything about it except from such papers as were handed you by other people connected with the Erie & Pacific Despatch?

A. No.

Q. Did you yourself personally collect any of these freights from the steamship company?

A. No, sir.

Q. You have no actual personal knowledge of the payment of any of these freights?

A. Yes, sir.

Q. By collecting?

A. The freights were charged to me, and I paid them.

Q. You have no personal knowledge of collecting the freights; you did not collect any of the freights from the steamship company?

A. No, sir.

Q. (The defendant's attorney.) I move to strike out the evidence of this witness as to the transportation of these goods.

45 The plaintiff's counsel desired to examine the witness further on the point, and the referee accorded him the permission.

Re-direct examination:

Q. When produce is shipped from Chicago to Liverpool under this arrangement, what was the mode and manner of doing the business,

and what was the evidence of the shipment at Chicago, and what came through you, and what was done?

A. The way bill.

Q. What is a way bill?

A. The way-bill shows the relative proportion of the freight the road carries.

Q. Who makes the way-bill?

A. The bill clerk, at the point of shipment.

Q. Who has the bill clerk?

A. The railroad receiving the property.

Q. Now, what was its state; does it describe the property?

A. So many barrels of pork.

Q. Tells what else it tells, tells where it is to go to?

A. Yes, sir.

Q. Tells who is the shipper of it?

A. No, sir; the bill of lading tells.

(Plaintiff's attorney calls on the defendant for the way-bills.)

DEFENDANT'S ATTORNEY. We never had any such papers, and therefore cannot produce them.

PLAINTIFF'S COUNSEL. Now, I propose to show what the process of business is in shipping, and then I propose to follow that up by showing that process was done in this case.

46 Q. Now, you have stated in answer to questions from Mr. Rowland that you got way-bills of this freight. Now, from whom did you receive the papers in reference to this freight? From whom did you receive any papers in reference to the shipments of this freight?

A. From our agent in Chicago, Carhart.

Q. Did you see them yourself after they came to your office?

A. I presume in this particular case I did see the papers; as a general rule it is not necessary.

Q. What is your best recollections as having seen them in this case?

A. I swear to it.

Q. In the course of business, where would these papers go?

A. Not outside of my office.

Q. What papers are used and signed by the steamship co. when they take the goods?

A. They sign a receipt which we can produce.

Q. Now, then, I want to ask you, when freight arrives here—when you have notice it arrives here—what is the course of business in respect to notifying anybody connected with the Ocean Line, if it is to go by the Ocean Line? How do you get it shipped on the Ocean Steamship Line, in case you have freight to go by it?

A. We apply to the freight agent, as we call him, the general freight agent, for permits to send the property alongside. We get that permit as soon as we can.

Q. Do you know whether when this freight arrived, or when you supposed it arrived, whether there was any such permit applied for?

A. Why, yes, the freight was shipped and we got the receipt.

Q. Where is the receipt?

A. At the Long Dock in Jersey City.

47 Q. Can you get it and produce it?

A. I am only an agent of the Erie Railway.

Q. Unless they object, you can get it?

A. Yes, sir.

Q. Do you know anything about any bills of lading going forward

now in the course of business in Chicago, of shipping freight in addition to bill of lading; is there any other paper signed?

A. The bill of lading is negotiated and signed in Chicago, the point of shipment.

Q. Explain a little better what you mean by negotiated.

(Objected to as immaterial and irrelevant. Objection overruled. Exception.)

A. I do not believe I could tell anything about that; I never shipped any property.

Q. What do you mean by negotiated?

A. I mean they are taken into bank, and they get money on them.

Q. In this case does any bill of lading go forward, by the railroad, other than the way bills?

A. No, sir; the railroad people don't bring any bill of lading; they bring an unsigned copy.

Q. Now, I am trying to get at what was done in this case, in reference to what papers the steamship co. give to show you that produce was shipped. Is there any other except that receipt you got?

A. No, sir; except the money for the inland freight.

Q. Now the learned counsel criticised you in saying that you knew the freight was paid, and you said you did not receive it, and then said it was charged to you. Now, what evidence or knowledge have you that the steamship company paid that inland freight or paid the Erie Railroad?

A. I certainly do know it was paid.

48 Q. (By the referee.) When your money is due how do you collect it?

A. Send a clerk.

Q. When the money comes back, you credit it upon your books?

A. Yes, sir.

Q. How do you usually get it, by check or otherwise?

A. Generally by check.

Q. Do you give any bill of the freight?

A. The steamship company take out their proportion of the through rate, and give us the balance as usual.

Q. Now did you in this case, or not, give any receipt for the freight when it was paid to you?

A. I don't know.

Q. Now you know Mr. Hurst very well?

A. I have that pleasure, sir.

Q. Have you had any conversation with him as to whether you had or not; whether this freight had or had not been paid? and, if so, state what was said between you and him on that subject.

(Objected to as immaterial and irrelevant; objection overruled; exception.)

A. I did have a talk with Mr. Hurst.

Q. What was it?

A. I told Mr. Hurst this contract was made in good faith so far as the Erie Railway or Erie and Pacific Despatch was concerned, but they did not have a dollar's interest in it. I merely asked him to take his rates out and pay us the difference, which he declined to do, because he was antagonistic to Mr. Tugman, having a judgment against him for $100, and that Mr. Tugman was not worth a cent, and didn't propose to carry out the contract for Mr. Tugman's benefit?

49 Q. (By the referee.) Was anything said at that time about how

far the contract had been executed; what had been done under the contract?

A. Certainly.

Q. What was said?

A. We took the contract, and we have the receipt for it.

Q. Was anything in this interview between you and Mr. Hurst said on the question as to his having carried the freight for Tugman?

A. I think this interview was before all the freight went forward, but at the same time Mr. Hurst said he would have to receipt his contract for the freight, but he should not pay anything more than our earnings, which would be the inward freight to New York added to 27s. 6d., which was his contract rate.

DEFENDANT'S ATTORNEY. Now I insist on my motion to strike out the testimony of this witness as to the transportation of these goods as incompetent.

Q. Have you ever seen any paper showing the delivery by the steamship co. of this freight, and of the collection of the freight money, any receipt from the company showing the delivery of the freight and acknowledging the collection of the money?

A. No, sir; but I can get the receipt.

The REFEREE. I cannot strike out the testimony.

(Defendant excepts.)

Q. Haven't you seen what purports to be a receipt of the steamship co., showing the receipt of this freight and delivery of it, and the amount of freight money which they collected?

50 (Paper shown witness.)

A. Personally I have not.

Q. Look at it, and see if you have not seen that paper.

A. I have seen this.

Cross-examination:

Q. Who was present at the steamship co. when you were talking with Mr. Hurst about this transaction you have been speaking of?

A. Col. Rowland, the attorney of Mr. Tugman.

Q. He was the only person who was present?

A. I think Mr. McKenzie was brought in at the same time.

Q. You only had a single conversation when Col. Rowland and Mr. McKenzie were present with Mr. Hurst?

A. To the best of my recollection, only one.

Plaintiff's attorney then read in evidence the deposition of GEORGE BEEDIE.

Deposition of witnesses produced, sworn, and examined the fifth and sixth day of October, in the year one thousand eight hundred and seventy six, at the United States consulate, Liverpool, England, under and by virtue of the foregoing annexed agreement, in a certain cause depending and at issue in the supreme court of New York, Kings County, in the United States of America, wherein Charles H. Tugman is plaintiff and the National Steamship Company is defendant, the plaintiff being represented during this examination by Mr. Timpson Martin, solicitor, and the defendant being represented by Mr. William Stone, solicitor.

51 George Beedie, by occupation freight clerk for the National Steamship Company; aged forty-one years and upwards; residing in Liverpool, England; being duly and publicly sworn and examined on the part of the plaintiff, doth depose and say as follows:

First, to the following interrogatories propounded by Mr. Martin:

Were the several packages of provisions in the following list landed from the respective vessels of the defendant company?

52

Number of bills of lading.	Number of packages.	Name of ship.	Name of shippers.	Landing weight at Liverpool.				Freight collected at Liverpool, sterling.		
				Tons.	*Cwt.*	*Quar.*	*Lbs.*	£.	*s.*	*d.*
156	50	England	H. Millward & Co	7	10	1	22	30	10	10
163	50	"	H. Millward & Co	7	10	1	22	32	5	11
35	250	"	W. Kirkwood	42	10	0	17	158	13	11
36	100	"	Fowler Bro's.....	27	1	2	16	101	2	2
38	250	"	W. Kirkwood	43	0	0	8	160	10	11
39	250	"	W. Kirkwood.....	62	9	3	23	233	6	3
40	250	"	W. Kirkwood	62	5	0	26	232	8	2
53	150	Spain	Fowler Bro's.....	47	17	1	18	178	14	4
54	50	Spain.....	Coey & Co	8	12	3	9	32	5	3
55	25	Spain.....	Coey & Co	3	10	3	1	13	4	2
56	25	Spain	Coey & Co.....	3	10	1	7	13	2	6
57	25	Spain	Coey & Co	3	11	0	2	13	5	2
58	15	Spain.....	Co y & Co	3	6	2	12	12	8	8
59	250	Spain.....	H. Millward & Co	62	18	1	20	234	18	1
62	500	Spain.....	H. Millward & Co	85	15	0	16	320	3	2
102	418	The Queen..	Fowler Bro's	109	3	0	23	443	3	10
117	334	The Queen..	Fowler Bro's	74	7	1	24	301	18	11
114	253	The Queen..	W. & J. Rogan	29	11	2	18	120	2	2
103	25	The Queen..	Coey & Co.....	6	16	1	26	27	14	1
104	25	The Queen..	Coey & Co	6	9	3	8	26	7	1
105	25	The Queen..	Coey & Co.....	7	11	2	15	30	15	8
106	10	The Queen..	Coey & Co	}	.....	.....	.....	.....	.....	.....
107	15	The Queen..	Coey & Co	} 6	12	3	26	26	19	11
108	25	The Queen..	Coey & Co	6	18	3	24	28	4	2
109	25	The Queen..	Coey & Co.....	8	0	2	25	32	12	6
110	25	The Queen..	Coey & Co	7	18	3	16	32	5	1
111	25	The Queen..	Coey & Co	7	19	3	11	32	9	0
112	25	The Queen..	Coey & Co	8	3	1	22	33	3	7
113	25	The Queen..	Coey & Co.....	6	17	3	24	28	0	2
118	25	The Queen..	Coey & Co	6	6	0	16	25	12	2
119	25	The Queen..	Coey & Co	6	3	1	3	25	0	6
120	25	The Queen..	Coey & Co	7	0	1	4	28	9	7
121	25	The Queen..	Coey & Co	7	0	1	4	28	9	7
122	25	The Queen..	Coey & Co	6	11	1	17	26	13	6
123	25	The Queen..	Coey & Co	8	8	1	15	34	3	8
128	25	The Queen..	Coey & Co.....	7	8	3	21	32	5	3
129	25	The Queen..	Coey & Co	8	0	3	20	32	13	4
132	25	The Queen..	Coey & Co.....	7	12	3	16	31	0	9
133	25	The Queen..	Coey & Co	6	6	2	20	25	14	4
134	25	The Queen..	Coey & Co.....	7	17	2	18	32	0	2
135	25	The Queen..	Coey & Co	6	14	0	2	27	4	1
136	15	The Queen..	Coey & Co.....	4	10	3	20	18	9	2
124	90	England .. .	W. & J. Rogan	11	7	3	9	46	5	0
126	100	England	H. Millward & Co	15	8	0	4	62	10	8
127	20	England	Coey & Co	6	9	3	16	26	7	4
130	25	England'....	Coey & Co	7	8	0	27	29	9	8
121	20	England	Coey & Co.....	5	7	1	4	21	15	7

53 He answers "yes."

Second, to the following interrogatory, propounded by Mr. Martin: Are the several bills of lading produced, numbered from one to forty-seven inclusive, copies of the original bills of lading relating to the goods on the list?

He answers yes

Third, to the following interrogatory, propounded by Mr. Martin: Did the defendant company receive of the goods on the list the several sums mentioned in it?

He answers: Yes, calculated on the landing weights at Liverpool.

Fourth, to the following interrogatory, propounded by Mr. Martin: Were the landing weights those mentioned in the list?

He answers yes.

Fifth, to the following interrogatory, propounded by Mr. Martin: Do you produce the original bills of lading?

He answers: No; the defendant company declines to give them up.

GEORGE BEEDIE.

54 Supreme court, Kings County, New York.

CHARLES H. TUGMAN
against
THE NATIONAL STEAMSHIP COMPANY.

I hereby certify that pursuant to a stipulation entered into by the parties to this action and hereto annexed, the witness George Beedie, whose deposition is hereto annexed, attended before me with the counsel for the respective parties on the fifth and sixth days of October, 1876, at the United States consulate, Liverpool, England, and, after hearing counsel, I proceeded to take the deposition of said witness, George Beedie, who, being duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined by the respective parties and testified as set forth in the within deposition heretofore annexed, to which the witness subscribed his name on each page thereof in my presence, after the same had been carefully read to him.

No interrogatories were propounded by the solicitor of the defendant.

I further certify that each and every exhibit produced and deposed unto by the said witness is hereto annexed, numbered from one to forty-seven inclusive, and each duly certified by me and sealed with my official seal, and that the said witness subscribed his name to each of said exhibits in my presence.

55 In witness whereof I have hereunto subscribed my name and affixed my official seal this the seventh day of October, 1876.

[SEAL.] LUCIUS FAIRCHILD,
United States Consul, Liverpool, England.

(Attached to this deposition are 47 copies of bills of lading.)

WILLIAM H. MCELHINNEY, being sworn and examined on behalf of plaintiff, testified:

Q. What is your business?

A. At present I am foreign freight agent of the New York Central Railroad.

Q. Do you know the National Steamship Company.

A. I do; if you mean Mr. Hurst as agent.

Q. You have had business transactions with them?

A. I have.

Q. Can you state the usual course of a through shipment of freight from any inland point to Liverpool.

(Objected to.)

Q. During the years 1874 and 1875?

(Objected to as immaterial, irrelevant, and incompetent.)

The REFEREE. I think this competent; I shall take that.

(Defendant excepts.)

56 A. I must ask first, before I can answer the question intelligently, as to what is understood as a through shipment.

Q. Property covered by a through bill of lading.

A. Well, the custom at that time was, I believe is yet, but at that time was, that property covered by a through bill of lading was contracted for by the agent of the railroad co., and a through bill of lad-

ing is issued for it, making the property deliverable at destination, wherever it might be, and on coming here was taken charge of here by the agent representing the railroad company, and delivered to the steamship company, and they then took charge of it and carried it on to the place of destination, and delivered it to the consignee.

Q. (By the referee.) You are testifying now, as I understand, what was the custom of the particular concern in which you were then concerned, are you not?

(Objected to as incompetent and immaterial. Objection overruled. Exception.)

A. Yes.

Q. Mr. McElhinny, in your relations with the New York Central Railroad, do you have business relations with more than one of the Ocean Steamship Companies?

A. I did.

Q. (By the referee.) How many of them?

A. With all of them.

Q. Do you know what the general course of business is between the inland lines and the ocean lines with regard to freight through bills of lading?

A. It is just as I have stated.

Q. You know what the custom is?

A. I do.

57 Q. Now with regard to the collection of freights on a through shipment on through bills of lading, what is the usual course with regard to the collection of freight, what do you do? What I mean to get at is the modus operandi of getting the bills of lading through and getting the freight money—just the way you do it?

A. The steamship companies pay us the charges we have against the freight, or our proportion of the through rate, and they collect—that is what they pay us, and of course, I presume they collected the whole on the other side.

Q. Now, on a shipment from Chicago to Liverpool, on a through bill of lading for 1,000 tons of freight, if you please, at a given rate, the rate stated in the bills of lading, please to state what the usual course would be for you to do; having made the shipment on a through bill of lading, what would you do with the bill of lading?

A. Well, that would depend entirely on what line I was shipping by.

Q. I mean with respect to collecting that freight money?

A. When the property is shipped we figure up the bill of lading; may figure it up before the property is shipped, but at the time the property is going forward we take the through rate named in the bill of lading, which is a rate that carries the property from the point of shipment to the place of destination. On that through rate we ascertain how much is collectable on the property at destination, according to the through rate named in the bill of lading, and from that amount we deduct the proportion due the steamship company for their carriage across the ocean, and we make out a bill against them for the balance; that is, the difference between their proportion and the amount collected at the destination, and that amount they pay us.

58 Q. Now, how do you get the ocean rate; suppose you have inquiry for a shipment of freight, how do you get this ocean rate?

A. The ocean rate is named to us by the steamship company.

Q. Is the name of the shipper ever given to you?

A. Not as a rule.

Q. Well, what exceptions, if any, are there to that, as a general rule?

The DEFENDANT'S ATTORNEY. Of course all this is taken under my objection, and over my exception.

The REFEREE. Certainly.

A. Oftentimes an agent in the West, by giving the name of the shipper or the party making the inquiry for the rate, we can take that inquiry and go to the steamship company, and the steamship company knowing who the shipper is, and knowing his extent of business, we oftentimes can get a lower rate than what they report as a general quotation, but those exceptions are very few. There are probably but one or two houses that would ever attempt to give the name of the shipper, but if we knew the freight came from such a house we might state that this shipment came from such a house for the purpose of getting a lower rate.

Q. (By plaintiff's counsel.) Is there such a thing or practice known in the business of transportation as contracting freights in advance, contracts made to cover future times, prices fixed for covering future time? Do you know of instances of that kind? Is there such a usage among railroad and steamship lines as making a contract to carry freight to be delivered to them for carriage at a future time?

A. Well, all the contracts are evidently of that nature.

59 Q. Is there a usage or practice for contracting for freight at a given price to be delivered for transportation at a future date?

A. Yes, sir; there is such a practice. I may add to that that it is not a general practice.

Q. What lines do you know of its being the practice with?

A. It is done more particularly with the German line.

Q. Do you know of its being done in any instance with the National line?

A. If you will allow me to ask a question or two, I can state.

Q. You may, or you can state it.

A. In talking about a general practice in making contracts for the future delivery, as I said before, every contract we made is for future delivery. It has got to cover a delivery of 10, 15, or 20 days. If we were transporting cotton from Memphis to come here it is generally understood that the contract is to allow time sufficient to make the shipment, to make contracts covering a period, allowing ample time for the property to be shipped, allowing ample time for it to reach here in New York. I can say it is not a general practice except so far as the German lines are concerned.

Cross examined:

Q. Your transactions differ, I suppose, with the different steamship lines. There is no rigid custom tying you down to any particular mode of business?

A. No, sir; all the lines have something peculiar to themselves in the way of doing business.

JOHN C. GALE, being sworn and examined on behalf of the plaintiff, testified as follows:

60 Q. What was your business in 1874, Mr. Gale?

A. I was sort of foreign agent of the Union Pacific Despatch.

Q. You were in the employ of the Union Pacific Despatch?

A. Yes, sir.

Q. Do you know the National Steamship Company?

A. Yes, sir.

Q. Do you know the plaintiff, Charles H. Tugman?

A. Yes, sir.

Q. Do you know anything of any shipments of freight by Mr. Tugman, through the Union Pacific Despatch and the National Steamship Company, in 1874 and 1875?

A. Yes, sir.

Q. Will you state what you know with regard to the shipment of Mr. Tugman over the line of the Union Pacific Despatch and the National Steamship Co.? State what you had to do with it.

A. From the start of it?

Q. Yes.

A. Well, we had an offer from Mr. Carhart, our agent at Chicago, offering us a thousand tons of freight to Liverpool at 27s. 6d.

Q. (By the defendant's attorney.) How did that offer come?

A. Came by telegram.

DEFENDANT'S ATTORNEY. I ask that the telegram be produced.

Q. Well, who was Mr. Carhart, and where was he located?

A. He was located in Chicago, 60 Park street.

Q. Where were you?

A. 305 Broadway.

61 Q. That was the office of the Union Pacific Despatch, was it?

A. Yes, sir.

Q. Well, now, what had you to do with the shipment of the freight; you have stated that a telegram was received; now, what had you to do with the shipment after that?

A. Do you want to know when I made the contract, and who I made it with?

Q. (By the referee.) After you got the telegram from Mr. Carhart, what did you do?

A. I submitted it to two or three steamship lines; the National Line, Inman Line, and White Star Line; made the man offer of 1,000 tons of freight to be shipped in December, January and February, at 27s. 6d.; I showed that telegram to Mr. McKenzie.

Q. Who is Mr. McKenzie?

A. He is the contract agent of the National Steamship Co.; when I talked with him he talked rather favorably towards it, and he said he could not do anything until he referred the matter to Mr. Hurst, and a day or two afterwards I went down there and I closed it with Mr. McKenzie as I understood at the time, of course, with Mr. Hurst's consent.

Q. What do you mean by closing?

A. That is, made a contract with them that they would carry the freight.

DEFENDANT'S ATTORNEY. What was said and what was done?

Q. (By the referee.) State, as near as you can, the substance of the conversation with Mr. McKenzie.

A. I have; I submitted it to him.

Q. What did you submit to him?

62 A. The contract for 1,000 tons of freight during December, January and February, and he said he would receive it.

Q. And what did he say?

A. He said he would accept the contract.

(By plaintiff's attorney.) What was done after that?

A. We telegraphed Mr. Carhart to that effect; when the shipment came forward, I had the handling of it as they came forward; I got a

permit from the steamship line and delivered it to them from time to time, until the contract was complete.

Q. (By the referee.) Was no one mentioned to Mr. McKenzie?

A. No, sir.

Q. Mr. Tugman's name was not mentioned?

A. No, sir; the contract was made with Sam. De Bow; that is the gentleman I was with, who is the president of the Union Pacific Despatch Co., and Mr. Carhart.

Q. Who is Mr. Carhart?

A. He was our agent at that time in Chicago.

Q. Then the contract in fact was made with your line?

A. Certainly.

Q. Mr. Tugman's name was not mentioned?

A. No, sir.

Q. No other shipper's name mentioned?

A. We didn't know who the shipper was; in fact, we never know who the shipper of the property is until we get a bill of lading.

Q. (By plaintiff's attorney.) Had you anything to do with collecting the inland freights of the through shipments?

A. Yes, sir; I collect the money, and settle with them.

Q. (By the referee.) With the National line?

63 A. Yes, sir; that is, our proportion of the inland freight for transporting that property from Chicago to New York.

Q. That was all the inland freight?

A. Yes, sir.

Q. (By plaintiff's attorney.) Have you made any statement or computation of the inland freight which you collected on the Tugman shipment?

A. I have a statement for the money that I received from time to time. I cannot give it to you in exact figures, but I can give it to you very close to it.

Q. Is that the statement that you made [a paper shown witness]?

A. Yes, sir.

Q. Can you state what amount of freight money you got for inland freight?

A. In the neighborhood of $8,000—somewhere near it. It may be a little less, but that is as near as I can get at it.

Cross examined:

Q. Did you personally collect this freight money, Mr. Gale?

A. Yes, sir.

Q. Who from?

A. The National Steamship Line.

Q. Who did you get it from there?

A. Mr. Barber, the cashier.

Q. And every amount of freight that was paid under this contract for this 1000 tons was paid to you personally?

A. Yes, sir; I receipted for it.

Q. By check?

A. By check.

Q. You personally saw all this freight as it came through?

64 A. I did not see every box; I saw it as it arrived.

Q. What proportion did you see of it?

A. I saw all of it, in fact.

Q. Then you did see it?

A. Oftentimes I would go over on the same boat from Long Dock to the steamship dock.

Q. Did you go every time?

A. I cannot say that I did.

Q. How many times did you go over on the boat?

A. I think, maybe, twice; sometimes there would be two or three lighter loads to one steamer.

Q. Did you have any discussion with Mr. Hurst about this matter personally?

A. Not personally, no. I think I went down there once or twice with Mr. De Bow in relation to the matter; I never had any conversation personally with him.

Q. Do you recollect any conversation between Mr. De Bow and Mr. Hurst?

A. I think it was in relation to changing the bills of lading from the original through rate to a lower rate.

Q. There was such a conversation as that between Mr. De Bow and Mr. Hurst?

A. I think so, but I don't recollect. I know there was a conversation of that kind came up. I am pretty sure there was, because the original copies that went into the steamship line were repudiated, and we had to make out new copies.

Q. What were those copies sent in the second time?

A. What we call the corrected copy?

Q. Yes.

A. They were put in, and the through rates were made at 67½, allowing the steamer 27s. 6 d., giving us just as much as would cover inland freight.

Q. Were these corrected copies copies of through bills of lading?

65 A. We never see a through bill of lading or the original. The steamship line never sees them until they get them on the other side.

Q. You never deliver any through bills of lading to the steamship company?

A. No; we never get the original.

Q. What was this corrected copy that you sent in? Describe that. It was a copy of the other bill of lading?

A. You mean the second copy?

Q. Yes.

A. The second copy was an exact copy of the other bill of lading, except the change of the through rate.

Redirect examination:

Q. Now, when a shipment was made at Chicago, what bills of lading are signed, do you know—Chicago to Liverpool? Do you know what bills of lading are signed?

A. Yes; there are two; I do not know exactly the number that they signed to negotiate.

(Objected to.)

DEFENDANT'S ATTORNEY. I do not suppose Judge Fithian can prove that until he lays some foundation for it.

Q. Now, did you get from the shipper or from your agent in Chicago in the first instance what purported to be copies of the bills of lading that had been signed for the freight?

Q. We did; but it was supposed to be an identical copy.

Q. Did you first get such papers?

66 A. We did.

Q. What purported to be copies of bills of lading that had been signed and kept in Chicago to negotiate?

A. Yes, sir.

Q. From whom did you get them?

A. From Mr. Carhart.

Q. Your agent out there?

A. Yes, sir.

Q. Now, what was the amount of through freight named on them before any alteration was made in them?

A. The majority of them was 87 cents, and then afterwards the inland freight dropped, and there was some portion that came through at 80 cents.

Q. From 80 to 87 cents?

A. Yes, sir.

Q. Now, what did you do with these copies, bills of lading?

A. We made a copy and gave them to the steamship company and they would not accept them.

Q. Why not?

A. Because the difference between the through rate and the inland rate was so great that they did not want to pay us that difference; they wanted the property to go through as contracted, and not pay any difference; that is, they did not want to pay any difference between the contract rate and the original bill of lading rate.

Q. There was a difference between the original bill of lading rate and the contract rate?

A. Yes, sir.

Q. A difference between 87 cents and 80 cents.

A. It would make a difference on the 87 cent. rate; it would make a difference of 19½ cents.

A. Now, then, I understand you to say that thereupon the company, not being willing to assume the collection of that difference, or

67 that payment of it to you, not being willing to advance to you the payment of that difference, they then demanded that these copies should be altered, or new ones made, stating the——what was done when they refused to receive it.

A. The first shipment that came forward we sent down to the steamship line.

Q. (By defendant's attorney.) Did you go the first time, yourself?

A. I cannot say whether I did or not. Most generally I think I went myself. I cannot say I went this particular time, but I most generally took them down myself.

Q. What occurred at some time when you took them down?

A. They were sent down there.

Q. Don't tell what was done with any bill that was sent down there. If you had any interview about any of those bills with any steamship company, tell what it was.

A. I did not.

Q. Then you say that the bills were sent down there and returned?

A. Returned.

Q. Then what was done with them?

A. There were new copies made.

Q. Then what was done with those new copies?

A. They were given to the steamship co., and went forward with the line.

Q. You say they were given to the steamship?

A. They are called ship's copies.

Q. How do you know they were given to the Steamship Co. Did you send them?

A. My dear sir, if they did not have them, they would halloa for them very quick. I would not hesitate at all in taking my oath they got them; but I cannot say I delivered them to them personally.

68 Q. Have you had any conversation with any of the officers on the subject since that time in which it was conceded or admitted, or anything said about getting them? You have a right to swear to what any one said or what was done, but you cannot swear to what you did not see yourself.

A. Well, I don't know that I had any personal conversation with any of them on that subject. I think Mr. De Bow took that matter in hand more himself, and I think some of it was done by letter.

Q. (By plaintiff's attorney.) This that you collected was on this inland freight?

A. Yes, sir.

Q. (By plaintiff's counsel.) Did you collect this inland freight on this bill of lading?

A. I did.

Q. (By plaintiff's attorney.) Examine these bills of lading, and say if they are the copies of the bills of lading as copied, or are they the same as were given to the steamship company?

(Witness shown bills of lading annexed to deposition of George Beedie.)

A. Well, I recognize the handwriting. It was done in our office.

Q. (By defendant's attorney.) Whose handwriting did you say these bills of lading are in?

A. Some by Mr. Harris, some by my clerk, Thomas Livingston, and some was done by myself.

JOHN B. HARRIS, being sworn and examined on behalf of the plaintiff, testified as follows:

Q. Mr. Harris, what was your business in 1874 and 1875?

69 A. I was in the employ of the Erie and Pacific Despatch from about the middle of October, 1874.

Q. Do you know the plaintiff, Charles H. Tugman, in this suit?

A. I have been introduced to this gentleman as Mr. Tugman.

Q. Do you know any of the affairs of the National Steamship Company?

A. By appearance.

Q. Had you any communication with any of the officers of the National Steamship Company in regard to the shipments of the Tugman freights?

A. I had one interview with Mr. Hurst.

Q. Will you state about the date of your interview with Mr. Hurst?

A. On reference to that book I find it was the 2d of *of* March, 1875.

Q. Look at that letter, and say if you wrote that letter.

(Letter shown witness.)

A. I did.

Q. After your interview with Mr. Hurst?

A. Yes, sir.

DEFENDANT'S ATTORNEY. Who is it to?

PLAINTIFF'S ATTORNEY. It is to Mr. Carhart, in Chicago. I show this witness a letter written by himself, and I ask him if that letter contains the substance of the conversation between him and Mr. Hurst.

PLAINTIFF'S COUNSEL. We do not offer it.

70 Q. (By plaintiff's counsel.) You said you had a conversation with Mr. Hurst?

A. Yes, sir.

Q. Did you about that time or immediately after make a memorandum in writing of the substance of that conversation?

A. Yes, sir.

Q. Now read that letter and refresh your recollection if you want to, and tell us what the conversation was.

(By defendant's attorney.) I suppose we have a right to have Mr. Harris's memory of what occurred?

(By the referee.) He has a right to read the letter to refresh his memory.

Read the letter, and then after reading that letter you are entitled to state what the conversation with Mr. Hurst was.

Q. (By the plaintiff's attorney.) State the occasion of the interview with Mr. Hurst—why you went to see Mr. Hurst.

A. The reason I called on Mr. Hurst that day was to procure an answer from him to a letter which I wrote to him a week previous, and in the conversation Mr. Hurst said what I have written here—that he supposed this thing would ultimately come to a lawsuit.

Q. (By the referee.) What do you mean by "this thing"?

A. The settlement of the moneys which the National Steamship Company had collected in Liverpool over and above the amount they had paid to the Erie and Pacific Despatch. Furthermore, that he was displeased with Mr. Carhart in the way in which he had hawked

71 about the contract in question on the Exchange in Chicago, and also that it was his opinion that Mr. Carhart was interested in the contract with Mr. Tugman.

Q. Was anything said as to Mr. Carhart's position in this matter?

A. I do not remember.

Q. What his relation was with the National Steamship Company, if any?

A. I do not remember of my own knowledge.

Q. Do you know anything about the original bills of lading at the advanced rates of 87½ cents?

A. Nothing personally, no.

Q. Do you know that they were presented to the National Steamship Company and they refused to accept them?

DEFENDANT'S ATTORNEY. Let him state whether he was present when they were presented.

A. I do not know personally.

Q. (By the referee.) Had you ever had a prior interview with Mr. Hurst in regard to this matter?

A. No, sir.

Q. You only had one interview with him?

A. I think I had a second, but I don't remember anything about it.

Q. This is the only interview you had, that you remember?

A. Yes, sir.

Q. Did Mr. Hurst give any reason why he thought there would be a lawsuit?

A. There were some reasons, but they are not clear in my mind.

Q. No recollection what he said?

A. Yes, sir.

72 Q. (By plaintiff's attorney.) Did he give any reasons for refusing to pay the money which was due to Tugman?

A. Well, he thought the contract was not a bona fide one, that it was something gotten up, and he had some previous experience with Tugman that would prevent him respecting anything he would do; that he was a man of straw, and that if the rates had gone the other way that Tugman would not have made good any advance; that was the substance.

Q. Did you make any reply to that?

A. Why, I simply said that the Erie and Pacific Despatch had nothing to do with that matter, but were merely acting as a transportation agent and had nothing to do excepting to carry out the wishes of our patrons and protecting their interests.

Cross-examined:

Q. When did you first hear Mr. Tugman's name mentioned in connection with this contract?

A. I think about the time that the property came forward. That was somewhere about the early part of January, 1875.

JOHN C. GALE, being recalled for further cross-examination, testified as follows:

Q. How many interviews did Mr. DeBow have with Mr. Hurst in your presence?

A. I know it was one, and I am under the impression it was two, but I won't say for certain.

Q. What part of the office did this interview take place that you recollect about?

A. Mr. Hurst's private office.

73 Q. Anybody there except Mr. DeBow, Mr. Hurst, and yourself?

A. I don't know there was. There might have been one of the boys in there, but I hardly think there was anybody there.

S. S. ROWLAND, being sworn and examined on behalf of the plaintiff, testified as follows:

Q. Mr. Rowland, won't you be kind enough to state if you had an interview with Mr. Hurst in reference to this claim, and when it was, and why it was, and what it was?

A. Well, a short time before the commencement of this suit I went with Mr. De Bow to see Mr. Hurst. We had an interview in Mr. Hurst's office, and after some conversation with Mr. Hurst on the subject of Tugman's claim the books were produced. The question in point was as to the amount of Mr. Tugman's shipments, and the books were brought in by Mr. McKenzie, into the office; but at that time the amounts were not determined by the books. After considerable conversation between Mr. De Bow and Mr. Hurst on the subject, I stated to Mr. Hurst that I had come in at solicitation of Mr. De Bow for the special reason that Mr. Hurst put some imputation upon him—his connection with the Tugman matter. That he thought while the Erie and Pacific Despatch were operating as agents in connection with the National Steamship Company, that they were making an improper use of the privileges between them. In other words, that the contracts that they had got through the Erie and Pacific Despatch for freight had been improperly used in Chicago, and that while Mr. Carhart was acting as agent for the Na-

74 tional Steamship Company he was acting in connection with the shippers for his personal advantage. In the conversation I understood from both parties——

DEFENDANT'S ATTORNEY. All that you have been saying now is what you yourself said to Mr. Hurst?

A. Yes; what I said myself to Mr. Hurst.

Q. (By the referee.) What did Mr. Hurst say?

A. Mr. Hurst said that he was not entirely satisfied with regard to that, but he said he had some experience with Mr. Tugman; that he had a claim against him; had a judgment against him.

Q. You then went on to state what Mr. Hurst said in reference to his suppositions, if you please, about his agents. What reply did De Bow make, if anything, to those insinuations or charges of Mr. Hurst?

A. Mr. De Bow said that Mr. Hurst was entirely mistaken with regard to that. The Erie and Pacific Despatch had not a dollar's interest in the contract at all; that they had faithfully performed their part of the contract.

Q. What did he say, if anything, in reference to the agents of the Erie and Pacific Despatch, Mr. Carhart, or himself or others having any interest in it?

A. He said he did not believe that Mr. Carhart would do anything of that kind at all, but if anything of that kind had taken place that he had no knowledge of it. I told Mr. Hurst that so far as I was concerned I would pay the judgment if he would pay the Tugman claim, the amount which Mr. Tugman claimed; that I was willing to pay his judgment.

Q. What judgment was that?

A. A judgment that Mr. Hurst had against Mr. Tugman.

Q. What was the amount of that; do you recollect?

75 A. That was about $120, $125, or $128.

Q. Well, go on if there is anything more. What did Mr. Hurst finally say in answer to that?

A. Mr. Hurst did not decide upon it at that time. I stated to Mr. Hurst that I understood that Mr. Tugman had been a good customer, had shipped a good many goods on his line, and that this matter was in such a position that I did not see how he could honorably claim the money; that whether it rightly belonged to Mr. Tugman or not, it certainly did not belong to the steamship company; and Mr. Hurst, as near as I recollect, stated that he did not know; he did not remember whether Mr. Tugman had done much business with this line or not; that the books would show, and that was the reason why the books were brought in; but it was not ascertained at that time how much Mr. Tugman had shipped, and the interview closed.

Q. Was it ascertained at that time the precise amount of money that the National Steamship Co. had collected of the consignees at Liverpool?

A. That was all stated; the amount which he claimed—nearly a thousand tons—that he claimed the advanced rate of 19½ c.

Q. Was it then known the precise amount of money that the steamship co. had collected in Liverpool on the whole bills; was it before or after this December?

A. It was before this December.

Q. Was anything said as to the amount of money the National Steamship Co. had collected from the consignees in Liverpool?

A. That was all talked over as to the amount that they had collected—the advanced rate, that was 19½ cents on the aggregage amount; whether that aggregate amount was stated in round numbers, I do not recollect; there was no dispute as to the amount; it was about $4,000; it was conceded that the amount was between $3,000 and $4,000.

76 Q. That the steamship co. had collected over and above the

through rate of 67½; that they had collected some $4,000 in additions from the consignee?

A. Yes, sir.

Q. Now, then, this conversation was as to whether they would pay that over; was that it?

A. Yes, sir.

Q. And he gave those reasons for not paying it over?

A. Yes, sir.

Q. And were those all the reasons he gave for not paying it over, substantially?

A. Yes, sir.

Q. Had you any other conversation with him after that?

A. Yes, sir; I saw him once after that, only for a moment.

Q. Was there anything said that bears on this subject at all?

A. When this conversation terminated, it was for the purpose of ascertaining the amount of shipments which Mr. Tugman had made, and I called in after that and saw Mr. Hurst just for a moment in the front office, and he expressed himself as not being any further satisfied, and that he would not pay it.

Plaintiff rested.

DEFENDANT'S ATTORNEY. I move to dismiss the complaint on the ground that there is no proof whatever of any contract between these defendants and this plaintiff, any privity of contract of any sort or kind between this plaintiff and the defendants, and the whole thing concentrated in the testimony of Mr. McKenzie, the general assistant manager and clerk of the steamship company, who was put here upon the stand, and who produced the book and contract, and stated that this
77 specific particular contract, made at that specific particular time, for this specific particular 1,000 tons of freight to be carried during the months of December and January, was made with the Erie & Pacific Despatch, and no one else.

There is no testimony here which entitles them to a recovery, and therefore we are entitled to a dismissal of the complaint.

Motion to dismiss the complaint denied, and defendant excepted.

DUNCAN R. MCKENZIE, being sworn and examined on defendant's behalf, testified:

Q. What is your position in connection with the business of these defendants?

A. Freight clerk.

Q. Do you make all their freight contracts?

A. Nearly all.

Q. How long have you been so emyloyed?

A. Six or seven years.

Q. Do you recollect an application made to you by Mr. De Bow to carry a thousand tons of freight in October, 1874?

A. I do.

Q. State what took place at that time.

A. Mr. De Bow came into our office with a telegram which he had from Chicago; Mr. De Bow brought me in a telegram, I think it was from Chicago, offering a thousand tons of provisions to be shipped from Chicago to go forward by our steamers in connection with the Erie & Pacific Dispatch at the rate of 27s. 6d.

Q. During what time.

78 A. To go forward during December & January; December, 1874, January, 1875; two months.

Q. Had you authority to make contracts for freight except with actual shippers?

A. No

Q. Did you ever make any contracts of freight except with actual shippers?

A. No; we make them on account of actual shippers. We make them through these people on account of actual shippers.

Q. Have you ever made contracts for freight to be assigned by the person with whom the contract was made?

A. How do you mean?

Q. Had you authority to make any contracts with anybody authorizing that person to transfer those contracts?

A. No, sir; that is entirely against my instructions.

Q. During the years 1874 and 1875, what mediums of freight transportation between Chicago and Liverpool did you deal with?

A. There were several; Erie and Pacific for one, the Star line for another, and one or two lines over the New York Central Road, Blue line and Red line.

Q. In any transactions of that kind, did you ever make any general contract with those shipping lines, or an especial contract in every instance by itself with the shipper?

A. Always a special contract. The contract was made with those lines on account of the shipper.

Q. What was the object in having bills of lading prepared?

A. So that they should be used when a contract was made.

Q. In preparing these bills of lading, was there any agreement or contract to make use of them in any specific particular case?

A. You mean the form of the bill of lading?

79 Q. Yes.

A. No.

Q. You simply prepared it as a form?

A. Yes, sir.

Q. And each contract that you made by which goods were shipped with these bills of lading was made by itself?

A. Was made by itself.

Q. Did you ever have any conversation with Mr. John C. Gale at the time of making this contract through Mr. De Bow?

A. Not at that time; may have had it afterwards. I made the contract with Mr. De Bow.

Q. And with him alone?

A. And with him alone.

Q. Was Mr. John C. Gale present at the time Mr. De Bow brought you that telegram, and you made that bargain through him?

A. No.

Q. Did you tell Mr. Gale that you were favorable towards this contract—towards making such a contract as was offered—but you could not do anything until you referred the matter to Mr. Hurst, and did he go down there a day or two afterwards and he, Gale, close the contract with you?

(Objected to as to form.)

A. No; Gale did not go down there, because I did not close the contract with Gale. It is very likely that I may have told Gale that I could not close the contract until I did refer it to Mr. Hurst. I don't remember to have so done, but it is not at all unlikely that I did so.

Q. You don't remember telling him that?
A. No, sir; but it is not at all unlikely; I might have done it.
Q. What conversations, if any, did you have with Gale in reference to this contract?
A. I don't remember of any.
80 Q. Were not all your conversations with regard to making and closing the contract with Mr. De Bow alone?
A. They were.
Q. Did Gale, at that time, show you any telegram from Chicago?
A. I don't remember.
Q. Did freights rise after that contract was made?
A. They did.
Q. What does shipper's option mean?
A. Shipper's option in a case like that would be whether the freight was to go forward in the month of December or in the month of January, in one month or both together.
Q. Did you ever make contracts by which you bound the company to carry freight for the future and allowed the shipper to send his freight or not as he chose?
A. No; never.
Q. That is not the meaning of shipper's option?
A. Certainly not.

Cross-examined:

Q. How long have you been the freight agent for this steamship line, about?
A. I have been in the same position as I am now, only with this company.
Q. By the company you mean the National Steamship Company?
A. Yes, sir.
Q. I asked you how long?
A. I am not positive, but I think about six or seven years.
Q. Was Mr. Hurst the general agent during all that time?
81 A. Not all.
Q. Who other?
A. Mr. Edwards for a short time.
Q. Previous to Mr. Hurst?
A. Previous to Mr. Hurst I was not; when Mr. Edwards was the manager of the steamship company, the freight clerk, I was in another position.
Q. This company, is it a partnership or corporation?
A. I don't know, really.
Q. It is an English company?
A. Yes, sir.
Q. But whether it is a corporation or not, as I understand, the principal corporators, or stock of it or interest of it, they are owned abroad—in England?
A. Yes, sir.
Q. Are you entirely under the directions and control in everything you do of the general manager here?
A. Of the manager here? Yes, sir.
Q. Now, what are your general duties as a freight clerk; supposing that the general manager was away where you could not consult with him at all, what is your general duty and authority in his absence?
A. I conceive I have authority from him to do the best of my ability.
Q. Everything that he could do in reference to freight?

A. He allows me that power.

Q. You understand that in his absence, or unless he specially takes charge or direction of it, in absence of special direction from him, you have the general authority in regard to freight that you have?

A. I have that authority from him.

Q. Now, you had been in the habit before this of making contracts for receiving freight from the West and apportioning the interest in it?

A. How do you mean apportioning the interest?

82 Q. They paid the freight down to here and collected the whole abroad?

A. Yes, sir.

Q. Had you made a good many such contracts with Mr. De Bow, the agent of this company?

A. Yes, sir.

Q. Did you ever require him to give up the names of the shippers?

A. I don't know that we ever did.

Redirect examination;

Q. In making contracts without consultation with Mr. Hurst, you always act in conformity with general instructions received from him?

A. Yes.

(By the referee.) When you say you were not authorized to make contracts of this kind except as representing actual shippers, what do you mean by that?

A. I mean to say when I made a contract with any of those despatch parties, that I understood that there was an understanding between us both; it was made with a particular shipper; that is, it was made with a regular shipper; that is, it was not to be a speculation.

Q. How did you get that understanding; was anything said about it to De Bow? How did you arrive at that understanding? You say you so understood it. How did you understand it?

A. All other people understood it; all others in the business.

Q. Do you remember having spoken to De Bow on the subject?

Q. (By defendant's attorney.) Is it or not the custom in dealing with these transportation lines for them always to obtain the freight from the actual shipper?

83 (Objected to on the ground that it is wholly immaterial and the contract has been executed. Objection overruled; exception.)

A. It is always the understanding, and so far as I know it is the custom.

Q. Would you have made that contract except with the understanding that those goods were to be forwarded by an actual shipper?

(Objected to; objection sustained; defendant excepted.)

Q. Were you much accustomed to make contracts ahead for future carriage of freight, that is beyond the necessary time, simply to get the freight in motion?

(Same objections. Objection overruled; exception.)

A. Not many; I made some.

Q. Did you testify about how many freight lines you dealt with between Chicago and here?

A. Yes, sir; I named several; I don't know whether I named them all.

Q. About what portion of the freight that came over the lines was taken by this line; or don't you recollect?

A. I don't know that I could give that without referring to our books.

Q. About that time did the Erie and Pacific Despatch bring more than usual of Chicago freight?

(Objected to. Objection sustained. Defendant's attorney excepted.)

84 Recross-examination:

Q. Who do you understand to be the shipper of the freight?

A. The party whose name is mentioned on the bill of lading.

Q. As the shipper?

A. Yes, sir.

Q. Do you know of a single instance where you collected freight from such a shipper?

A. How do mean, if I've ever collected the freight?

Q. From any person named in the bill of lading as the shipper?

A. We did not collect the freight from the shipper.

Q. (By defendant's attorney.) Never do?

A. Never do.

Q. (By plaintiff's counsel.) So you mean to be understood, as your answer says, that you always collected it from the shipper?

A. I did not say we collected the freight, I said it was the understanding that the engagement was made.

Q. The fact is, that you collected the freight of the consignee?

A. Of the consignee, certainly.

Q. And in all cases where you got the freight from westward of this port, you, on its coming to your hands, advanced the westerly bound freight, and then when the property is delivered to the consignee you collect the whole?

A. That is the usual custom, the whole freight on the bill of lading is paid by the consignee.

Q. Then you collect the whole freight and keep it?

A. Yes, sir.

FRANCIS W. J. HURST, being sworn and examined in behalf of the defendant, testified as follows:

85 Q. What is your position and connection with the defendants?

A. Managing agent of the company.

Q. Have you ever given any authority to Mr. McKenzie to make contracts for freight, except with the actual shipper?

A. No, except through brokers with the actual shippers.

Q. You include also despatch lines?

A. Yes, sir.

Q. When did you first see Mr. De Bow in relation to the contract now in suit; when did you first have an interview with him in reference to it, personally?

A. It was after some of the goods had gone forward, a large portion of them, I suppose about the end of February.

Q. State what took place between you and Mr. De Bow about that time.

A. I asked Mr. De Bow who the owner of this contract was; he said at first, he thought I had no right to ask, and I insisted on knowing, and he then told me it was Mr. Tugman, of Chicago; that was the first I heard of Mr. Tugman's name in connection with it.

Q. What else took place?

A. I stated to him that his agent, Mr. Carhart, at Chicago, had been hawking this contract over the Chicago Exchange, and I was reliably informed he had been offering rebates to ship over the Erie & Pacific Despatch, and that my agents were seriously aggrieved about it, and that it damaged their business, and I saw surprised to hear anything of

the sort, and I simply said they must be interested in the contract to the extent of the rebates offered these shippers; I said, also, that I wanted to know when Mr. Tugman was brought into the matter, and he said he was brought in at the time the contract was made,
86 and offered to bring telegrams and letters to prove such to me, which he afterwards did; he brought one telegram from himself—a copy of a telegram from himself—to Carhart, asking the name of the shipper.

Plaintiff's counsel objected to and moved to strike out the answer.

(Objection overruled—exception.)

PLAINTIFF'S COUNSEL. The last part of the answer in reference to the telegram I move to strike out, unless the telegram is produced.

The REFEREE. You can't give evidence of the contents of the telegrams unless you have laid the foundations by calling for the original.

DEFENDANT'S ATTORNEY. We give the other side notice to produce it.

The REFEREE. Testimony lastly objected to stricken out.

Q. Those copies of bills of lading attached to the commission that you see there you have seen for the first time?

A. Yes, sir; I don't know what these bills of lading are; they do not appear to be filled up, half of them.

OLIVER J. GEER, being duly sworn and examined on behalf of the defendant, testified as follows:

87 (Plaintiff's counsel objected to any proof of the matters set up in the proposed amended answer, on the ground that it does not constitute a sufficient defense. Objection overruled; exception.)

Q. What is your business?

A. An agent of the fast freight lines of the Pennsylvania Railroad.

Q. How long have you been in this business?

A. A good many years; I cannot remember at this moment.

Q. Do those lines take goods from inland points for transportation to Great Britain?

A. Yes, sir.

Q. Are you *you* acquainted with the general modes of doing business of all the various transportation companies with the ocean steamship companies?

A. I am familiar with our own way of doing it, and I suppose I am familiar with that of other responsible lines.

(Objected to.)

Q. Is there such a thing as a custom in the business between the fast freight lines and the steamship companies with reference to the transportation of freight between inland points and Great Britain?

A. I can only state positively under oath in regard to our own line, our own manner of doing business.

Q. Have you been connected with any other lines than those over the Pennsylvania Railroad?

A. No, sir.

Q. Have you ever had any other experience in that business?

A. No, sir; none except in connection with our own lines.

88 DEFENDANT'S ATTORNEY. I propose to prove by this witness that when applications are made for freight they are made always on behalf of bona fide shippers, and contracts are never made except with actual shippers.

The REFEREE. I will admit this testimony subject to Mr. Rowland's objections.

(Exception.)

Q. Will you go on and state the mode of doing business between the steamship lines and the fast freight lines for transportation from inland ports to Great Britain?

A. With us, upon an application of a shipper in the West for through rates it is the custom for our agents to ask me for the ocean rates, say from New York to Liverpool, and when he is advised of that he adds the two rates together, which he quotes as a through rate to the shipper, and I make an engagement with the steamship company here for the property, whatever amount he may have named.

Q. Do you make such engagements except with actual shippers?

A. None to my knowledge.

Cooss-examination:

Q. Who do you mean by your agents?

A. The agents our lines in the West.

Q. Do you ever inquire of your agents in the West the names and occupations of the shippers.

A. Never.

WILLIAM H. MCELHENNY, being sworn and examined on defendant's behalf, testified as follows:

89 Q. What familiarity have you with the mode of doing business in transportation of goods from inland points to Great Britain by the inland railroad forwarding lines and the steamship companies?

A. It is merely from a knowledge derived from business during the past eight years in which I have been connected specially with that department, both by the line I am now representing and the Pennsylvania Railroad, which was formerly connected with on the fast freight lines connected with the Pennsylvania Railroad.

Q. How many fast freight lines running over the Pennsylvania Railroad Company were you connected with?

A. Two.

Q. What's your present position?

A. I am now the foreign agent of the New York Central Railroad and its fast freight lines.

Q. How many of those lines have you under your charge?

A. Seven.

Q. Have you or not a general knowledge of the mode of doing business outside of your special connection with these lines?

A. Well, in my opinion, I have.

Q. Now, will you state the mode of doing business between these Western fast freight lines and the steamship companies with regard to the transportation of goods to Europe?

A. Will you state the part or the whole thing?

DEFENDANT'S ATTORNEY. The point to which I want to draw attention, about which I care for evidence, is how those contracts are made and carried out.

(Objected to as immaterial. Objection overruled—exception.)

90 A. The first thing is to get at the rate. Our agents in the West either use a rate that has been furnished to them by myself. If they have a rate on hand for that purpose or if they have not, they telegraph to me for a rate upon a particular line of property, from New York to the place of destination, say Liverpool, London, or any other place. We always understand, of course, that this rate—(objected to)—

that rate is given to the agent in the West, to which he adds his inland rate, and then quotes it to the shipper, giving a through rate from point of shipment to the port of destination. If the shipper accepts the rate the agent in the West telegraphs me the rate as accepted, and I notify the steamship company of the acceptance of their rate. That, of course, closes the rates so far as we are concerned.

Q. Do you notify the steamship company of the name of the shipper?

A. No, sir; not as a rule; we do in some cases state to the steamship co. who the shipper is, because it oftentimes has a bearing on the rate which he gives us.

Q. What is the custom of the business with regard to applications for freight from actual shippers?

(Same objection.)

(By the referee.) Is there a custom with regard to these applications being made by actual shippers?

A. Well, it is rather a hard question for me to answer whether there is a custom. That is a question I think will be better settled in the West.

Q. Is there a custom in the lines of which you had charge with regard to actual shippers?

A. It is our custom, not only our custom but a rule with the lines I represent, that all of these contracts that we make are to be made with actual shippers.

91 Q. Are any goods allowed to be shipped on these contracts except goods of the actual shippers with whom the contract is made, so far as you know?

A. Not to my knowledge.

(By the referee.) Do you give any instructions to your agents out West on that subject?

A. As to whether they make a contract with one man?

Q. Yes.

A. There are no instructions to my knowledge.

Q. How do you know when you are advised of contracts made in the West, whether they represent actual shippers or not?

A. We do not make——

Q. Do you give the agents in the West instructions to make no special contract except with actual shippers?

A. We instruct them to make no contract with anybody except with actual shippers.

Q. Leaving them to determine as to their responsibility?

A. Yes, sir.

Cross-examination:

Q. Will you name the number of through steamship lines between here and Liverpool, and through railroad freight lines between here and Chicago?

A. Give the names of the lines or the number?

Q. The names will do as well.

A. Between here and Chicago?

Q. Between Chicago and Liverpool.

A. I will have to count them up.

Q. Approximate.

92 A. I should say three railroad lines and five steamship lines.

Q. Are not those three railroad lines and five steamship lines very frequently in competition for freight?

A. I should say they were at all times in competition.

JOHN D. KEILEY, Jr., being sworn and examined on behalf of defendant, testified as follows:

Q. What is your business?

A. I am in the forwarding business and agent for some time of the lines with regard to this through freight.

Q. From inland points to England?

A. Not only England, but other foreign ports.

Q. Is there a custom with regard to making contracts of that kind with actual shippers only?

A. So far as my information and experience goes, I have always understood that it was a custom for the inland agents in reporting engagements to represent actual shippers.

Q. What has been the habit in that respect of your own line?

PLAINTIFF'S COUNSEL. What line is that?

WITNESS. I represent lines that come from various parts, principally the Atlantic and Mississippi and Ohio Railroad and the Chesapeake and Ohio Railroad.

(Objection overruled; exception.)

93 A. The lines that I represent are in the habit of applying to me for the ocean rates of freight, and adding the inland rate to the ocean rate. If an engagement is made, the engagement is reported giving the quantity of the article engaged and the line for which it is engaged, and then I book the engagement with the foreign line, and consider it a binding engagement. Very frequently the ocean lines limit me in giving the rates to specify quantity of freight. I am usually allowed so many bales or so many packages.

Q. Do you allow your agents to ship under those contracts anything except the goods of the people with whom your contract is?

A. Well, we quote rates to our agents. It is probably a little different in the cotton business from the grain business; we quote the market rates at which they can operate for that particular market, to the time for which the rate is given. It is not for a specific shipper.

Q. (By the referee.) You give them a general rate?

A. Yes, sir.

Q. That they operate upon?

A. Yes, sir.

Q. Under which you agree to carry freight for them?

A. Yes, sir.

Q. (By defendant's attorney.) Do you allow them under those rates to make a contract with anybody but actual shipper of his own goods?

A. Well, I don't know who they make they contract with until after they report the engagement and frequently until after I receive the bill of lading, nearer points where sometimes rated are given to large shippers, which are different from the usual or general rates; no one is allowed, of course, to avail of that rate except the shipper to whom the rate is given, and this is subject to objection.

Q. (By the referee.) How do you distinguish that from the cases you have been speaking of?

94 A. This last case, for instance, the shipper in Virginia may manufacture two or three millions of pounds; his business is an object of a foreign line, and the foreign line may make a contract for that shipper's business, in order to control the whole of it. Give him the special rate, which will probably last for a year, which is confined exclusively to that shipper.

Q. Where that didn't prevail, what is your general practice, to leave the matter to the agent of the interior places?

A. Yes, my habit is to give the agent a rate which is applicable to any bona fide shipper.

Cross-examination:

Q. Where are you agent. What place?

A. In New York.

Q. For what line?

A. For the Atlantic, Mississippi and Ohio, and the Chesapeake and Ohio; all the connections of the Old Dominion Steamship Co.

Q. Are you agent for the steamship company or the interior lines?

A. For the steamship company and the interior lines.

Q. Both?

A. Yes, sir.

Q. And the scope and purview of your agency is what? What is the object, purpose, and scope?

A. So far as those lines are concerned, merely their foreign freights.

Q. What is the particular purview of your business as agent for these two lines?

A. To keep their agents informed with regard to ocean rates, so that they may be in a position to make contracts for our American products for foreign ports.

95 Q. In other words you may be said to be an intermediary between the steamship lines and the interior freight lines?

A. Yes, sir.

Q. A middle man, so to speak?

A. Yes, sir.

Q. You have a right to speak for the steamship lines on one hand and also to deal with the interior lines on the other? That is, you are a common focal point where they both approach each other?

A. Yes, sir.

Q. Now, are you paid a salary by either of the steamship lines or the interior freight lines?

A. Well, sir, I get a commission on my business.

Q. Isn't it true that you are simply a freight broker?

A. No, sir.

Q. Who pays you?

A. I am paid—you may call it a freight broker.

Q. Isn't that the substance of it?

A. I get my commission from the inland lines, the railroad people. I make an arrangement with them to attend to their business in New York, furnish them rates, and I have the transferring of their goods when they reach New York, and I charge them so much for my facilities for giving them the information and the carriage of their goods between the inland and foreign line. It is a little different from most of the other transportation lines in that respect.

Q. You do not charge the steamship lines anything? You do not get any commission from them?

A. Yes, sir. I get a freight brokerage on all my freight I deliver to them.

Q. Then the substance of this, as I understand it, if you are apprised by any of the agents of the interior lines that they want to ship a line of freight to Liverpool, they apply to you. Then what do you do?

96 A. I telegraph them after I have obtained it from the ocean line the ocean rate of freight.

Q. That is the rate that these lines for which you are assuming to act will take their goods, when it is delivered here in New York and landed in Liverpool, that is it?

A. Yes, sir; of course there is a restriction.

Q. You have terms in every case?

A. Yes, sir.

Q. Then, as I understand you, if an agent of any interior railroad line comes to you and wants to ship some freight to Liverpool, your first business is to ascertain what he can transport it over the steamship lines for?

A. Yes, sir.

Q. You have nothing to do with making bargains as to what it shall be transported over the lines for?

A. No, sir.

Q. For that duty, when freight is transported, you charge the railroad lines a certain commission, and you also charge the steamship lines a certain brokerage for your business?

A. No, sir; I charge the railroad lines a certain price for handling their goods in the city of New York.

Q. Well, now, is it not true that in every instance you fix a price at which the goods offered shall be carried from the interior ports to Liverpool, or do you fix the price at which the goods shall be carried from your own port to Liverpool?

A. From this port to Liverpool.

Q. Now, sir, is it of the slightest consequence to you as to whoever ships those goods unless you make special rates with the shipper.

A. Unless we make a special rate with the particular shipper it is of no consequence.

Q. You look to the goods for your pay, and not to the shipper?

97 A. Of course the goods are responsible for that freight.

Q. Isn't it true you look to the goods for your pay, and not the shipper?

A. Certainly; yes, sir.

GODFREY MACDONALD, being sworn and examined on behalf of the defendant, testified as follows:

Q. What is your business?

A. I am agent for the Michigan Central and Great Western Railway in Chicago.

Q. How long have you been in that business?

A. Since April, 1876, with this road.

Q. How long have you been in that kind of business at Chicago?

A. Over fifteen years since I first began.

Q. Are you familiar with the custom at Chicago governing contracts between people shipping freight to be transported to Europe and the railroad freight lines receiving that freight?

(Objected to as to form. Allowed. Exception.)

A. Yes, sir.

Q. What is the custom in that respect in regard to making contracts with shippers to ship their own freight?

A. I telegraph to our agents at the seaboard to get from them the rate by steamer at the time the property is to be shipped, and then add to that our local inland rate reduced to gold, the two rates through making the through rate to Liverpool.

Q Is it the custom in making contracts of that kind by the rail and freight agents to make them with anybody except actual shippers of goods?

98 A. I have never made them except with actual shippers to my knowledge.

Q. Is it the custom with anybody in Chicago to make them with anybody but actual shippers?

A. Not that I know of.

Q. And actual shippers of their own goods?

A. The brokers do not ship their own goods only upon order, but an actual shipper we call a man that will ship goods. When he comes to present goods he ships them to his own order, but we don't know where or whom they are from. I never had applications from any one else but those who were regularly in the business, except in the case of some man that wants to ship five or ten boxes for some friend.

Cross-examination:

Q. There is a good deal of competition on freights in Chicago?

A. Yes, sir.

Q. Always has been?

A. I can't say that there always has been.

Q. There has been during 1874 down to the present time?

A. Yes, sir.

Q. When you telegraph to a steamship company in New York to get a freight rate, do you always name the shipper?

A. No, sir.

Redirect examination:

Q. Do you ever telegraph except upon the application of an actual shipper?

A. No, sir.

99 (By the referee.) What do you understand by an actual shipper?

A. A man that is doing the business right along. I may correct myself in that; if anybody came in, no matter who it was, I simply telegraphed for him and got a rate for him who asked me. Anybody might come in and ask for a shipment.

Q. When you say an actual shipper, do you mean to say that the actual shipper must use the rate you give him?

A. That is what we suppose; when the man asks for it he uses it for himself.

Q. Suppose it is for other people?

A. If I procure it for the shipper, I do not know whether I could refuse it in case he did not use it. I don't know what the law is about that. For instance, in April I took from several parties a large amount of freight for delivery in May; of course the rates have advanced very materially, and one of the parties took freight from other lines as well, and I understood he was selling those contracts or arranging with other parties, and I notified him we should expect him to ship under his own name. But whether I could hold my position in that I can't say; I don't know whether I would have been justified if he would have come and offered me 1,000 boxes in refusing it.

Recross-examination:

Q. You look to the freight for your freight money?

A. Yes, sir.

Q. So it is a matter of indifference who ships it?

100 I wouldn't do justice to my own company if I gave contracts to a party to speculate on. If a man takes a positive contract I don't know that he could make me fill on the order or some one else.

Redirect-examination:

Q. You act as the agent of the steamship company?

A. When I get an order for 1,000 packages of beef I become the agent for the steamship company, and my agency ceases when the space has been filled.

Q. Under that agency have you a right to take freight from anybody except the actual shipper?

(Objected to.)

JAMES T. NICHOLSON, being sworn and examined on behalf of defendant, testified as follows:

Q. What is your employment?

A. I am secretary and shorthand writer for the general freight agent of the Erie Railway.

Q. You are familiar with the rate of inland freight between Chicago and New York during the period from Oct. 1, 1874, to Feb. 12, 1875?

A. Yes, sir.

Q. State what those rates were.

(Objected to.)

DEFENDANT'S ATTORNEY. I offer to prove by this witness that from Oct. 1, 1874, to the 13th February, 1875, the inland freights between Chicago and New York never arose above 45 cents, and what variations there were were to a lower rate than that.

(Excluded; defendants excepted.)

Testimony closed.

101 Supreme court, Kings County.

CHARLES H. TUGMAN, PL'FF,
against
THE NATIONAL STEAMSHIP CO., DEF'T.

Take notice that the defendants hereby except to the first conclusion of law found herein by Henry Nicoll, esq., referee.

That the defendants also except to the second conclusion of law found herein by said referee.

That the defendants also except to said conclusions generally, because upon the facts proved herein the referee has not decided that the plaintiff has no cause of action against defendants, and because upon the facts proved herein he has not decided that the defendants are entitled to judgment against the plaintiff.

JOHN CHETWOOD,
Att'y Deft.

102 Supreme court, Kings County.

CHARLES H. TUGMAN
vs.
NATIONAL STEAMSHIP COMPANY.

It is hereby ordered that the case and exceptions, as settled by the parties to this action, be annexed to judgment roll herein and filed by the clerk of the court.

Sept. 8, 1877.

HENRY NICOLL,
Referee.

103 At a general term of the supreme court, held in and for second judicial department, at the court-house in the city of Brooklyn, the 12th day of February, 1878.

Present, Hon. J. F. Barnard, P. J., Hon. J. W. Gilbert, Hon. J. O. Dykman, justices.

CHARLES H. TUGMAN
vs.
THE NATIONAL STEAMSHIP COMPANY.

The appeal from the judgment entered herein having been brought on for argument before this court, now, after hearing counsel for the respective parties, and due deliberation having been had thereon, it is ordered that the said judgment be, and the same hereby is, affirmed with costs.

An extract from the minutes.

JOHN DELMAR, *Clk.*

104 Supreme court, Kings County.

CHARLES H. TUGMAN, RESPONDENT,
against
THE NATIONAL STEAMSHIP COMPANY, APPELLANT.

Judgment.—February 19, 1878.

The appeal from the judgment entered in this action on the 27th day of June, 1877, for 4,992$\frac{71}{100}$ dollars, having been heard at the general term, it is now, on motion of S. S. Rowland, for respondent, after hearing B. C. Chetwood for the appellant, adjudged that the said judgment be affirmed, with 72$\frac{60}{100}$ dollars costs to the respondent.

(Signed) JOHN DELMAR, *Clk.*

105 New York supreme court, county of Kings.

CHARLES H. TUGHMAN, PL'T'FF, RESP'T,
against
THE NATIONAL STEAMSHP COMPANY, DEF'T, APP'L'T.

Take notice, that the defendant in above entitled action hereby appeals to the court of appeals of the State of New York from the order made by the general term of the supreme court in the second judicial district, on the 12th day of February, A. D. 1878, affirming the judgment in this action, entered on the 27th day of June, 1877, in the office of the clerk of the county of Kings, in favor of the plaintiff and against the defendant, for the sum of $4,992.71; and also from the judgment entered upon such order in favor of the plaintiff and against the defendant in the said clerk's office, on the 19th day of February, A. D. 1878, affirming the aforesaid judgment, and for the sum of $72.60, costs

of appeal; and from the whole and every part of the said several judgments and said order.

Dated February 19th, 1878.

Yours,

JOHN CHETWOOD,
Att'y. Def't.

To S. S. ROWLAND, Esq.,
Att'y Pl'ff.

The clerk of the county of Kings.

(Endorsed:) Filed Feb. 20, 1878.

106 Supreme court, county of Kings.

CHARLES H. TUGMAN, PLAINTIFF,
against
THE NATIONAL STEAMSHIP COMPANY, DEFENDANT.

STATE OF NEW YORK,
County of Kings, *ss.:*

John Delmar, clerk of the county of Kings and clerk of the supreme court in and for the said county, do hereby certify that the preceding is a true and correct exemplification of the judgment roll and notice of appeal in the above entitled action, now remaining on file in the office of the clerk of the said county, and of the whole of the said judgment roll and notice of appeal.

In witness whereof I have hereunto set my hand and affixed the seal of the said county, this 2d day of March, A. D. 1878.

[SEAL.] JOHN DELMAR, *Clerk.*

107 CHARLES H. TUGMAN
ag't
THE NATIONAL STEAMSHIP COMPANY.

GILBERT, J.: Satisfactory proof was given of the actual making of the contract with the plaintiff. We are of opinion that the surrounding circumstances and the plaintiff's course of business preclude the limitation which the defendant now seeks to put upon the contract, namely, that the defendant should carry goods only of which the plantiff should be the actual shipper. Nothing of that kind was said when the contract was made, and such a limitation would be inconsistent with the nature of the transaction. I should infer, from the evidence, that when contracts like that in this case are made, the engagements of the carriers created thereby are dealt with as commodities, and are bought and sold for speculation on the exchanges, in the same manner as engagements for the future delivery of merchandise or stocks. The engagement of the defendant in this case was sold by the plaintiff in parcels to the several shippers of the merchandise. He testified to that fact explicitly, and the evidence was not contradicted. It appears, also, that the merchandise shipped was delivered to the Erie & Pacific Dispatch Company in Chicago, with orders from the plaintiff that the same should be delivered to the defendant in New York, for transportation to Liverpool. The entry made on the defendant's books of the receipt of the merchandise indicates very clearly that it was received in the fulfilment of the defendant's contract with the plaintiff. The bills of lading

also correspond with this version of the transaction. The alteration made in the duplicate handed to the defendant cannot affect the
108 rights of the parties, and I can discover no legal significance in the act except to prove notice to the defendant that the shippers had agreed to pay for freight at a greater rate than that fixed by the contract with the plaintiff. It is needless to review all the evidence upon the subject. It is sufficient to say that, upon an examination of it, we have come to the conclusions expressed.

It is said that the agent of the defendant, by whom the contract with the plaintiff was made, was not authorized to enter into contracts except with actual shippers, and verbal evidence was given to that effect. But "actions speak louder than words."

We are of opinion that the general course of business of the defendant, especially its acts and conduct in respect to this particular transaction, and more especially the fact that the authority to make the particular contract in this case was communicated to the agent by means of a telegraphic dispatch which contained no restriction or limitation whatever, are ample to prove both an original authority to make the contract and a complete adoption by the defendant of the acts of the agent under that authority.

The merchandise was sent from Chicago under what is called joint bills of lading, that is to say, bills of lading executed by the Erie & Pacific Despatch Company, under a general authority from the defendant. Those bills provided in the usual terms for the delivery of the merchandise to the consignees named therein, in Liverpool, on payment of the freight stated therein, being that agreed upon between the shippers and the plaintiff, which, as before stated, was greater than would result from the addition of the freight specified in the contract between the defendant and the plaintiff to that which was payable for the carriage of the merchandise from Chicago to New York, freights from New York to Liverpool having advanced in price in the interval between the making of said contract and the shipment of the merchandise. In other words, the freight payable according to the bills of lading
109 embraced a rate for ocean freight in excess of the rate specified in the contract between the defendant and the plaintiff. The merchandise thus sent came forward charged with a lien for all the freight. The defendant advanced to the Erie & Pacific Despatch Company the amount of freight due that company, and, upon the delivery of the merchandise in Liverpool, collected the whole freight specified in the bills of lading. The referee decided that the plaintiff was entitled to recover the excess so received by the defendant over the amount advanced to the Erie & Pacific Despatch Company and the freight stipulated for by its contract with the plaintiff, with interest on such excess. We are of opinion that that decision is correct, for the reason that such excess belongs, in justice and equity, to the plaintiff, and is recoverable as money had and received to his use.

The owners of the merchandise shipped have no claim against the defendant for such excess, for they have paid no more than they agreed to pay. As before stated, they merely purchased from the plaintiff his right to have the merchandise carried. If the plaintiff had acted as their agent in procuring such carriage, they might claim that he was incapacitated from receiving the benefit of his contract with the defendant, and that such excess in equity belonged to them; and if such had been the case, the owners would have had the right of action which the plaintiff here claims. The defendant, however, as long as the contract with the plaintiff remains in force, is divested of all right to retain such

excess. The plaintiff did not act as agent of the owners. The merchandise was carried by the defendant under the liability to the owners created by the bills of lading, but the liability to return the excess of freight received is one which the law implies in favor of the plaintiff, and not of the owners. That the law does imply such a liability to somebody is clear upon principle and authority (Moses v. MacFerson, 2 Burr, 1005; Eddy v. Smith, 13 Wend., 490; Colvin v. Holbroock, 2 Coms., 130). That the implication is in favor of the plaintiff is
110 also clear. The defendant, it is true, did not by its contract with plaintiff agree to collect freight due him, but, having carried the merchandise and collected the freight upon bills of lading which required the consignee to pay a greater sum for freight than the contract with the plaintiff entitled it to demand, it did impliedly undertake to collect the excess for the person entitled thereto. Hence there is no lack of privity between the parties.

We think none of the exceptions of the defendant were well taken. It may as well be mentioned that many of the exceptions of the plaintiff have been argued as if the ruling had been adverse to, and the exception had been taken by, the defendant.

With respect to the point raised at the trial that this court had been ousted of jurisdiction by the proceedings to remove this action into a Federal court, we are of opinion that the petition of the defendant was fatally defective, because it did not show that the defendant was an alien or citizen or subject of a foreign state or country at the time of the commencement of the action, but only when the petition was prepared. The defendant has also submitted to the jurisdiction of the court, and litigated the action upon the merits, before a referee, appointed with its own consent. After those acts it was too late to take the objection of want of jurisdiction.

The judgment must be affirmed, with costs.

111 At a special term of the New York supreme court, held at the court-house, in the city of Brooklyn, Kings County, on the 12th day of February, 1879.

Present, Hon. Jackson O. Dykman, judge.

Supreme court.

CHARLES H. TUGMAN
vs.
THE NATIONAL STEAMSHIP COMPANY.

This cause having been *been* brought on upon the remittitur therein, sent down from the court of appeals, and now filed in this court, by which remittitur it appears that an appeal was taken by the defendants from the judgment of this court to the said court of appeals, and that the judgment appealed from had been affirmed with costs, and that the record and proceedings had been directed by said court of appeals to be remitted to this court, and this court directed to enforce the said judgment of the court of appeals, according to law:

Now, therefore, on motion of S. S. Rowland, of counsel for the plaintiff, it is ordered and adjudged, that the judgment of the said court of appeals be, and the same is hereby, made the judgment of this court, and that the plaintiff have execution against the defendants for
112 the costs, when adjusted by the clerk, and inserted in this judgment, as well as for the amount adjudged to be recovered in and

by the judgment of this court, entered the 27th day of June, 1877, and the judgment for costs entered February 19, 1878, and that this order or judgment be annexed to the judgment record herein.

Dated February , 1879.

(Signed) J. O. DYKMAN, *J. S. C.*

(Signed) JOHN DELMAR, *Clerk.*

(Endorsed:) Filed Feb'y 12, 1879.

113 *Judgment on appeal to the New York court of appeals.*

Supreme court, Kings County.

CHARLES H. TUGMAN
vs.
THE NATIONAL STEAMSHIP COMPANY.

FEB. 24, 1879.

An order having been made in this action on the day of February, 1879, by the court of appeals for the State of New York, affirming the judgment entered in this action June 29, 1877, in favor of the plaintiff against the defendants for $4,992\frac{71}{100}$ dollars, with costs, and the said costs having been taxed at $\$72\frac{60}{100}$ dollars, and the costs of appeal to the said court of appeals having been taxed at $\$123\frac{85}{100}$ dollars; and on reading and filing the remittitur in this action by the court of appeals, remitting the proceedings in this action with the judgment of the said court of appeals into this court to be enforced according to law, and on motion of S. S. Rowland, attorney for the plaintiff, it is ordered, adjudged, and decreed that the plaintiff, Charles H. Tugman, recover of the defendant the said sum of $\$123\frac{85}{100}$ dollars, and that they have execution thereof.

(Signed) JOHN DELMAR, *Clerk.*

(Endorsed:) Filed Febr. 24, 1879, at 3.45 p. m.

114 STATE OF NEW YORK,
Court of Appeals Clerk's Office.

I, Edwin O. Perrin, clerk of the court of appeals of the said State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of Charles H. Tugman, respondent, vs. The National Steamship Company, appellant, with the original on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this 28th day of February, A. D. 1879.

[L. S.] (Signed) F. S. PERRIN,
Deputy Clerk.

115 Court of appeals.

CHARLES H. TUGMAN, RESPONDENT,
vs.
THE NATIONAL STEAMSHIP COMPANY, APPELLANT.

B. C. Chetwood, for appellant.

F. J. Fithian, for respondent.

Miller, J.:

The evidence upon the trial of this action established that the plaint-

iff was applied to by the agent of the Erie and Pacific Despatch Company in reference to engaging freight for the months of December and January, 1874, from the city of Chicago, in the State of Illinois, to the city of Liverpool, in England. That thereupon the plaintiff asked such agent the price of such freight, and he informed the plaintiff that he had telegraphed and got a thousand tons at 27s. 6d. per ton in the National line, and upon being requested to do so said he would make it at shipper's option. The plaintiff informed him that he would take it at the price named, and requested the agent to let him know when it was fixed; the agent said he would make the engagement then and plaintiff replied that he would accept, and the agent telegraphed to the president of the Erie and Pacific Despatch Company, saying that the plaintiff had got the one thousand tons. The Despatch Company
116 had a joint bill of lading with the defendant with authority to engage freight to Liverpool and London. A memorandum of the terms of the contract was entered on a book the defendant kept for such a purpose by a freight agent of the company; upon receiving the despatch, to the president of the Despatch Company, that the freight was engaged at the time when the contract was made, there was no conversation to the effect that the defendant should carry only such goods as actually belonged to or were forwarded by and in the name of the plaintiffs, nor was any entry made in the memorandum book or elsewhere, by which the contract was restricted in this respect. The agreement was absolute and unqualified in its terms, and without any limitation or condition as to the shipper.

A fair interpretation of the terms of the contract as agreed upon most manifestly entitled the plaintiff to ship the freight to the amount named without regard to the fact whether it belonged to or was shipped by him or by other parties under his contract. He had a right, we think, to assign or sell the entire contract or any portion or share of it, as suited his own wishes, or as might contribute to his own advantage, and it did not rest with the defendant to repudiate the contract because other parties to whom the plaintiff had trans-
117 ferred an interest with the plaintiff's consent shipped a portion of the goods. The defendant reaped the same benefit from the contract whether the plaintiff was the actual shipper or a third party. As it may be assumed that the plaintiff was at the trouble and expense of procuring and by his own exertions obtained the freight, it would be but just that he should be entitled to the profits arising from the contract over and above what he had agreed to pay, as the fruits of his enterprise.

In accordance with the contract the plaintiff had entered into, he shipped sixty-five tons of freight in his own name and he procured the remainder of the one thousand tons; all of which were delivered to the Erie and Pacific Despatch Company at Chicago, with directions that the freight be forwarded to the defendant in New York and then transported to Liverpool. All was received and shipped in fulfillment of the contract made with the defendant and the freight arising from the same on such of the goods as were not shipped directly in the name of the plaintiff was charged at a greater rate than the price fixed by the contract with the plaintiff and was received by the defendant from the persons to whom the merchandise was shipped.

The leading facts to which reference has been had established,
118 we think, a liability on the part of the defendant to pay over the money received for the freight beyond the price named in the contract. The plaintiff agreed to furnish the freight at a price

fixed, and the defendant having received a larger sum than the amount charged for the freight, was clearly bound to account to the plaintiff for the sum of money which came into the defendant's hands beyond the sum agreed to be paid for the transportation of the freight. The money thus received did not belong to the defendant, but to the plaintiff, and an action lies for money had and received for the use of the plaintiff.

When a person receives money of another, which in equity and good conscience he ought to refund, the law implies a promise to account for it to the owner. (Eddy vs. Smith, 13 Wend., 488-490, and authorities cited.)

It is true the complaint in the action, after alleging the contract and the execution thereof, contains an averment that the defendant wrongfully and fraudulently collected the money from the consignees and converted to the use of the defendant the sum belonging to the plaintiff; but these allegations were unnecessary, and inasmuch as the complaint contained a statement of facts, constituting a cause of action on contract, sustained by proof of such facts upon the trial, it was sufficient to authorize a recovery. (Conoughty vs. Nichols, 42 N. Y., 83.)

119 It is said that the contract on the part of the defendant, having been obtained by concealment of the proposed shipper's name and a suppression of facts, was void ab initio. There is no sufficient evidence to establish a concealment or suppression of the facts, and at most it was a question of fact for the referee to determine.

The claim urged, that the agent of the defendant had no authority to enter into any contract, except with actual shippers, we think is not sustained, although there is some evidence to that effect. Yet, taking the whole transaction together, there is sufficient to establish that the defendant knew that the contract was not thus limited, and it was entered as unrestricted by the agent of the company upon the books. But were it originally unauthorized the circumstances tend to show that the contract as made by the agent was adopted by the defendant. It may also be remarked that no such point was raised upon the trial, nor was any request to find to that effect made to the referee, so as to present this question upon appeal.

It is also objected that there was no privity of contract between the plaintiff and the defendant. Altho' the contract was entered into with the defendant's agent before the goods arrived in New York, it

120 had received the bills of lading, had notice of the contract under which the goods were to be shipped, and at least knew that the plaintiff was owner of the contract before all the goods had been forwarded. It ratified the contract, and became a party by its acts in carrying the freight, collected a larger amount due for such freight upon the bills of lading than the contract with the plaintiff called for, and thus bound itself to account for the excess to the plaintiff, who was entitled thereto. There was sufficient evidence of privity, we think, to bind the defendant.

There is no ground for claiming that the owners of the merchandize shipped have any claim against the defendant for the excess of freight beyond the price agreed upon by the defendant and the plaintiff. They paid no more than the actual value of the freight at the time, for which, as the case stands, they were liable and had agreed to pay. They purchased from the plaintiff the right to have the freight transported, subject to charges therefor, and were obligated to pay the same to the owners of the vessels primarily. The right to have the merchandize carried belonged to the plaintiff alone, and he agreed to sell it to the owners thereof, subject to the payment of proper charges, which were

121 not limited to the price fixed between the plaintiff and the defendant. As they have paid these charges, and no more than they agreed to pay, no claim exists in their favor to recover any portion of the defendant.

In regard to the question raised upon the trial, that this court was ousted of jurisdiction by the proceedings instituted to remove the case into the United States circuit court, we think that the petition was defective in not showing that the defendant was an alien citizen or subject of a foreign power at the time of the commencement of the action, but only when t e petition was signed and sworn to. The omission referred to brings the case directly within the decision in the case of Pechner vs. Phenix Ins. Co. (65 N. Y., 195.)

It may also be remarked that since the order refusing to remove the case the defendant consented to the appointment of a referee to determine the case, and submitted to his jurisdiction by trying the action on the merits. It is at least questionable whether he has not thus waived his right to insist that a removal had been had. The various exceptions taken to the rulings of the referee upon the trial, in respect to the admission and exclusion of evidence, have been carefully consid-

122 ered, and none of them present any ground of error which would authorize a reversal of the judgment.

The judgment should be affirmed.

All concur.

Folger and Earl, JJ., concur in result.

Rapallo, J., absent.

I certify the foregoing to be a true copy of the original opinion on file in this office.

Albany, February 28th, 1879.

H. E. SICKELS,
State Reporter.

123 *Indemnity bond.*

Know all men by these presents, that we, Francis W. J. Hurst, of New York City, and Henry Roussel, of New Brighton, Staten Island, are held and firmly bound unto Char es H. Tugman, in the sum of fourteen thousand dollars, lawful money of the United States of America, to be paid to the said Charles H. Tugman, his executors, administrators, or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated the 6th day of March, one thousand eight hundred and seventy-nine.

Whereas the National Steamship Company of Liverpool, England, hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered by the court of appeals of the State of New York in an action wherein the above named Charles H Tugman is plaintiff, and the said The National Steamship Company is defendant, which judgment has been remitted to the supreme court of the State of New York to be enforced:

Now the condition of the above obligation is such that if the said The National Steamship Company shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

F. W. J. HURST. [SEAL.]
H. ROUSSEL.

Sealed and delivered in presence of—
ADAM GOS.

124 STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Francis W. J. Hurst, of No. 615 Fifth Avenue, New York City, being duly sworn, on his oath says, that he is one of the sureties named in and who executed the within bond; that he is a resident and householder within the State of New York, and is worth the sum of fourteen thousand dollars over and above all his debts and liabilities, property exempt by law from execution.

P. W. J. HURST.

Sworn to before me this March 6th, 1879.
[SEAL.]

ADAM GOS,
Notary Public, N. Y. Co.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Henry Roussel, of New Brighton, Richmond County, New York, being duly sworn, on his oath says, that he is one of the sureties named in and who executed the within bond; that he is a resident and freeholder within the State of New York, and is worth the sum of fourteen thousand dollars over and above all his debts and liabilities, and property exempt by law from execution.

H. ROUSSEL.

Sworn to before me this March 6th, 1879.
[SEAL.]

ADAM GOS,
Notary Public, N. Y. Co.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

On this 6th day of March, 1879, before me personally appeared
125 Francis W. J. Hurst and Henry Roussel, to me known to be the same individuals described in and who executed the within bond, who severally acknowledged that they executed the same.
[SEAL.]

ADAM GOS,
Notary Public, N. Y. Co.

(Indorsed:) Supreme Court of the United States. The National Steamship Company, pltff. in error agst. Charles H. Tugman, defdt. in error. Bond for damages and costs. Filed Mch. 6, 1879. Jno. Chetwood, att'y pltff. in error, 74 B'dway, N. Y.

Approved.

S. E. CHURCH,
Ch. J. Ct. Appeals, N. Y.

126 The United States of America to Charles H. Tugman, greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and seventy-nine, pursuant to the writ of error, filed in the office of the clerk of the supreme court of the State of New York, Kings County circuit, at Brooklyn, in said county and State, wherein The National Steamship Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error, mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated at the city of Albany, this 6th day of March, A. D. eighteen hundred and seventy-nine.

S. E. CHURCH,
Chief Judge of the Court of Appeals of the State of New York.

127 STATE OF NEW YORK,
City and County of New York, ss :

On this ninth day of October, A. D. 1879, before me, the subsriber, personally appeared Adam Gos, to me personally known, who makes oath that on the 7th day of March, 1879, he served on S. S. Rowland, esq., to him known to be the attorney of Charles H. Tugman, the within named defendant in error, at his office, 157 Broadway, New York City, the within citation by delivering to and leaving with said Rowland, personally, a true copy of said citation.

Witness my hand and notarial seal the day and year aforesaid.

[SEAL.] WM. A. BARTOW,
Notary Public Kings Co. Cert. filed in N. Y. Co.

(Indorsed :) Supreme Court of the United States. The National Steamship Company, pltff. in error, ag'st Charles H. Tugman, deft. in error. Citation ret'ble 2d Monday Oct. 1879. Jno. Chetwood, att'y pltff. in error, 74 B'dway, N. Y. Filed M'ch. 6, 1879.

(Indorsement on cover :) No. 582. The National Steamship Company. plaintiff in error, vs. Charles H. Tugman. New York sup. court. Filed 11th October, 1879.

16-118

Supreme Court of the United States.

THE NATIONAL STEAMSHIP COMPANY,

Plaintiff in Error,

vs.

CHARLES H. TUGMAN,

Defendant in Error.

Brief of Plaintiff in Error.

JOHN CHETWOOD,

Attorney Plaintiff in Error.

145 Broadway, New York.

NEW YORK:

Evening Post Job Printing Office, cor. Broadway and Fulton Street.

(Law Telephone No. 541.)

1882.

Supreme Court of the United States.

THE NATIONAL STEAMSHIP COMPANY,
Plff. in Error,

vs.

CHARLES H. TUGMAN,
Deft. in Error.

Brief of Plaintiff in Error.

Statement of Case.

Defendant in error, a citizen of the State of Illinois, brought his action in the Supreme Court of the State of New York, in the County of Kings, against the plaintiff in error, an English corporation, by the service of a summons and complaint (Record pp. 3 and 4).

Thereupon plaintiff in error presented a petition and a bond, conforming to the Statutes of the United States in the matter of removal, to one of the Judges of the Supreme Court of the State of New York, and obtained from him an order dated July 14, 1875, to show cause why such removal should not be ordered into the United States Circuit Court for the Eastern District of New York. On argument on July 21, 1875, the motion was denied and removal was refused, and on the same day said petition, bond and orders were filed in the office of the Clerk of the County of Kings (the Clerk of the Supreme Court).

(Record, pp. 8, 9, 10, 11.)

Plaintiff in error then answered, and the cause coming on to be tried on the issues so raised, was by consent referred (Record, page 5).

At the trial before the Referee, plaintiff in error objected to the jurisdiction of the New York Supreme Court and its Referee, because of the presentation and filing of such petition and bond, and insisted that the State Court was ousted of jurisdiction. The Referee overruled the objection, and proceeded with the trial (Record, p. 11). The Referee having found in favor of defendant in error, judgment was entered against plaintiff in error in the Supreme Court of New York, in the County of Kings, on the 27th day of June, 1877. From which judgment, an appeal was taken by plaintiff in error to the General Term of the Supreme Court (Record. p. 7).

Upon argument, such judgment was affirmed and judgment of affirmance entered accordingly (Record, p. 48).

The question of ousted jurisdiction, by reason of the proceedings for removal, was raised and argued upon this appeal, and jurisdiction of the State Court was upheld, because, according to the decision of the General Term, the petition for removal did not show that plaintiff in error was an alien citizen, or subject of a foreign State or country at the time of the commencement of the action, but only when the petition was prepared, and also because, as the General Term likewise decided, plaintiff in error had submitted to the jurisdiction and litigated before a Referee chosen with its own consent (Record, p. 51.)

Plaintiff in error appealed from this judgment to the Court of Appeals of the State of New York (Record, p. 48.) On argument the judgment of the General Term was affirmed by the Court of Appeals (Record, p. 2.)

The question of ousted jurisdiction of the State Court by reason of the proceedings for removal, was raised and argued upon this appeal, and jurisdiction of the State Court was upheld, for the first reason given by the General Term, to wit: That the petition was defective in not showing that plaintiff in error was an alien citizen, or subject of a foreign power, at the time of the commencement of the action, but only when the petition was signed and sworn to (Record, p. 55.)

A remittitur issued from the Court of Appeals to the Supreme Court of the State of New York, in the County of Kings, remitting such order and judgment of the Court of Appeals, to be enforced by said Supreme Court, and a judgment was entered accordingly in said Supreme Court (Record, pp. 51, 52.)

The plaintiff in error then obtained from the Chief Judge of the said Court of Appeals, an allowance of a writ of error to the said Supreme Court, commanding it to send the record and proceedings in said action to this honorable court (Record, page 1.)

The said Supreme Court sent such record and proceed, ings under its seal, attested by its clerk to this honorable Court (Record, p. 2), and by virtue of such writ of error such cause is now pending in this honorable court.

First.

The language of the petition which the State Courts held insufficient to entitle plaintiff in error to removal, was as follows: "That your petitioner is a corporation created and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland;" they insisted that such allegation only showed alienage at the time of preparing or verifying the petition and not at the commencement of the action.

"*Created*" is the material word which of necessity by its past tense and its meaning refers to the origin, the first coming into existence of this corporation; and its continued existence past the commencement of the action to the time of the verification of the petition is expressed by the next word "*existing*," and such creation and continued existence are in the petition set forth as "under and by virtue of the laws of the United Kingdom of Great Britain and Ireland."

At and after its creation the artificial person exists and as such artificial person "resides in the place of its creation and

there only." The New York Court of Appeals itself lays down this rule of law very strongly: "A corporation is an artificial being and has no dwelling either in its offices, its depots, or its ships. Its domicil is the legal jurisdiction of its origin, irrespective of the residence of its officers or the place where its business is transacted. * * * * A corporation cannot migrate from one sovereignty to another so as to have a legal local existence within the latter sovereignty." (Stevens *vs.* Phenix Insurance Co., 41 New York, 149.)

If, as plaintiff in error's petition alleges, it was created under the laws of Great Britain, or, in the language of the Court of Appeals, "the legal jurisdiction of its origin" was Great Britain, it "cannot migrate," and the alien it originally was created it continues while it exists. To deny that it was existing at the commencement of the action involves an absurdity, and it is the alien existence, at this period of time, which the State Courts hold is not set forth. The complaint of the defendant in error, in great part the basis of and referred to in the petition for removal, alleges the foreign incorporation of plaintiff in error at the commencement of the action (Record, p. 4.)

This Honorable Court has so laid down the rule of corporate citizenship within the jurisdiction of its origin as to make discussion of the point unnecessary. (Bank of Augusta *vs.* Earle, 13 Peters, 586; Ohio and Mississsppi R, R. *vs.* Wheeler, 1 Black., 286.) In the language of the first of the cases *supra*, "it must reside in the place of its creation."

Although it is respectfully insisted that the language already quoted from the petition suffices to show alienage at the commencement of the action, the other allegations have the same effect; that plaintiff in error "has its principal offices for the transaction of its business at Liverpool, in said Kingdom." "That the meetings of its stockholders and the sessions of its directors are held at Liverpool aforesaid, and its records are kept at and the governing power of the" plaintiff in error "acts and issues its orders from said City of Liverpool." Although the existence of these facts is asserted in the present tense, they are of such character that to confine them to the instant of time when the assertion is made, would be a very narrow construction, they will

be intended to cover the corporate existence of the alien plaintiff in error.

Pechner *vs.* Phenix Insurance Company, 65 New York, 195, the case referred to in the opinion of the Court of Appeals to sustain the narrow construction given by that court against the plaintiff in error is significantly and materially different from this case. In that case the plaintiff, a natural person, was not alleged to be a citizen at the commencement of the action, nor was there any allegation of defendants foreign incorporation they were stated in the petition to be at that time citizens respectively of New York and Connecticut, and it was on this defective allegation as to the plaintiff the natural person that refusal to remove was sustained at Genral Term of the Supreme Court (Pechner *vs.* Co., 6 Lansing 415), and this was the main reason given by the Court of Appeals on affirmance. The case therein quoted as authority (Holden *vs.* Putnam Fire Insurance Company 46 N. Y., 1), had the same defective allegetion.

Second.

The record shows that the proceedings in this action in the State courts were throughout *in invitum* on the part, of the plaintiff in error. Before the time for answer expired it prepared and presented its petition and bond for removal, and made its motion to that end (Record p. 8). When the motion was denied and the action held by the Supreme Court, it, of necessity to save judgment by default, answered (Record p. 5). When defendant in error brought on the trial, it agreed with him as to which of the three modes of trial appointed by the law should be adopted (Record p. 5), but at that trial raised and insisted upon its objection that the State court was ousted of jurisdiction by the removal proceedings, and duly excepted when that objection was overruled (Record pp. 8, 11.)

It insisted and argued at General Term that the State

court had been ousted of jurisdiction, and the court passed upon the question (Record p. 51). It so insisted and argued in Court of Appeals, and that court passed upon the question.

Its demand for a removal to the United States Court and its denial of the jurisdiction of the State courts was by timely, sufficient, consistent and persistent application and insistment.

When the State courts refused removal and held jurisdiction, the mere ordinary service and acceptance of the usual notices and papers in the action as it proceeded, and participation in that litigation where plaintiff in error was on the defensive, and did defend and appealed from State court to State court as the law and practice allowed, in no wise deprived it of its original right to removal, or its right to seek a reversal in this court of the judgment so rendered against it after refusal to remove. The old leading case, Gordon *vs.* Longest (16 Pet., 97), while reversing a judgment because removal, refused, uses this language: "A more summary remedy might have been pursued by the defendant than the one which this court now gives him." This case disposes, not only of the contention by defendant in error, that by litigation in the State courts plaintiff in error waived its right to remove, but also that it so waived its right by not taking proceedings to force removal.

To the same effect:

Stanley *vs.* Chicago, &c., R. R. Co., 62 Mo., 508.
Stevens *vs.* Phenix Ins. Co., 41 N. Y., 149.
Hadley *vs.* Dunlap, 10 Ohio, 1.

The error committed in the State courts was jurisdictional, and cannot be cured.

The jurisdiction usurped by them cannot be sustained.

Kanouse *vs.* Martin, 14 How., 23.
Same, 15 *Ibid.*, 198.
Ins. Co. *vs.* Dunn, 19 Wall., 214.
Removal Cases, 10 Otto, 475.

Third.

The right of an alien corporation to resort to the United States courts in litigation with citizens, is highly prized. Its officers and stockholders naturally look to the national tribunals with more confidence, and rely upon them for impartial justice. The jurisdiction given to them by the Constitution and Statutes, is admittedly to secure that confidence and that impartiality. This honorable court will not sustain the narrow construction put upon the law, in this case, by the State courts of New York, shutting out plaintiff in error from a highly prized right, given it by the National Constitution and Statutes.

Fourth.

The proceedings in the State courts, subsequent to presentation and filing of petition and bond, are *coram non judice* and void, and the judgment entered in the Supreme Court of the State of New York, upon the remittitur in this action, from the Court of Appeals of said State of New York, should be reversed, set aside, and held for naught.

B. C. CHETWOOD,
Of Counsel for Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES.

THE NATIONAL STEAMSHIP COMPANY,
Plaintiff in Error.

against

CHARLES H. TUGMAN,
Defendant in Error.

BRIEF

FOR

DEFENDANT IN ERROR.

F. J. FITHIAN,
Attorney for Defendant in Error.
No. 57 Broadway, N. Y.

JAMES R. CARMICHAEL,
Of Counsel,
No. 155 Broadway, N. Y.

A. H. CAFFEY, LAW PUBLISHER,

Supreme Court

OF THE UNITED STATES.

THE NATIONAL STEAMSHIP COMPANY,
Plaintiff in Error,

against

CHARLES H. TUGMAN,
Defendant in Error.

SIR:—Take notice that upon an affidavit and papers, copies of which are herewith served upon you, and upon the Writ of Error in this suit and the return thereto, and upon all the pleadings, proceedings and files in this suit, and the brief of the attorney and counsel for the defendant in error in this suit, which papers contain a statement of the facts and object of the motion hereby noticed; a motion will be made to this Court on Monday, the twentieth day of December next, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for an order and decision dismissing the writ of error in this case, on the grounds, first, that it manifestly appears upon the records and proceedings before stated, that this Court had no jurisdiction to entertain said writ of

5 error or to further proceed thereon; and second, that it does manifestly appear upon the face of said papers, records and proceedings, that the Court of the State of New York had jurisdiction to give and render the several judgments in the said action in the said papers, records and proceedings set forth; and third, upon grounds that if the Circuit Court of the United States in said papers and proceedings referred to ever obtained jurisdiction to hear and determine the issues in said action, such jurisdiction was abated and aban-
6 doned by the acts and omissions of the plaintiff in error herein, and the Courts of the State of New York reinvested with such jurisdiction.

And further, at the same time and place and upon the same papers, a motion will be made for an order affirming the judgment of the Court of Appeals and the Supreme Court of the State of New York, for the revival of which the writ of error is brought, on the ground that even if it should appear from the records and proceedings herein that this Court has jurisdic-
7 tion to entertain and proceed upon said writ of error herein, it is nevertheless manifest that said writ of error was taken for delay only, and that the question upon which the jurisdiction of this Court depends, is so frivolous as not to need further argument, and for such further and other order or judgment in the premises as this Court may see fit to grant.

Dated November 27, 1880.

Yours, &c.,

F. J. FITHIAN,

8 *Att'y for Defendant in Error herein,*

No. 57 Broadway, N. Y.

JAMES R. CARMICHAEL,

Att'y of Record for Plaintiff in State Court,

No. 155 Broadway, N. Y.

To JOHN CHETWOOD, ESQ.,

Att'y for Plaintiff in Error.

SUPREME COURT

OF THE UNITED STATES.

THE NATIONAL STEAMSHIP COMPANY,
Plaintiff in Error,
against
CHARLES H. TUGMAN,
Defendant in Error,

STATE OF NEW YORK,
City and County of New York. } ss.:

FREEMAN J. FITHIAN, of said city and county, being duly sworn, deposes and says, that he is and during all the time in this affidavit referred to, has been an attorney and counsellor of this Court and of all the Courts of the State of New York, and that he is and has been associate counsel for the defendant in error in this action (plaintiff in the Court below), since about the time of the commencement of the trial and hearing of this action before the Referee therein, as is fully set forth and appears in the return to the writ of error herein and is now attorney for defendant in error in this Court.

That S. Starr Rowland, Esq., an attorney and counsellor of the Supreme Court of the State of New York, was the Attorney of Record for the said defendant in error in all the proceedings in the Courts of the State of New York, to and until the time of his death, shortly after the bringing of the writ of error to this Court, and that James R. Carmichael, Esq., has been substituted for him. That as deponent is informed and believes and as appears from the records and files in this action, the same was commenced by the due service upon the proper officers of the plaintiff in error of the sum-

13 mons and complaint or declaration of the said Tugman, as plaintiff in the Supreme Court of the State of New York, in and for the County of Kings in said State, on or about the 24th day of June, 1875.

That as appears by the record herein the attorney and agent of the plaintiff in error, the Steamship Company, thereupon on or about July 14th, 1875, procured an order from one of the Justices of the Supreme Court of the State of New York, in and for the said County of Kings, requiring the de-
14 fendant in error to show cause before him why the said action should not be removed into the Circuit Court of the United States for the Eastern District of New York in the Second Circuit, for trial, which order was founded upon the petition of the Steamship Company and the bond or undertaking annexed thereto, which are fully set forth in the return to the writ of error in this action.

That upon the hearing of the said order to show cause, such proceedings were had on the 21st day of
15 July, 1875, that the motion of the said plaintiff in error to remove the said action into the said Circuit Court of the United States for trial, was then and there denied with ten dollars costs.

That thereupon, as deponent is informed and believes, and as appears from the said notice, now in deponent's possession, John Cheetwood, Esq., attorney for the plaintiff in error in this action, caused to be served upon the attorney for the said Tugman, defendant in error, a notice of retainer in
16 said Supreme Court of the State of New York, in and for the County of Kings, in the words and figures following, to wit.:

"NEW YORK SUPREME COURT. 17

"CHARLES H. TUGMAN,

"*against*

"THE NATIONAL STEAMSHIP
"COMPANY.

"Please to take notice that I am retained by, and 18
"appear as attorney for, above defendants in this
"action, and demand that all papers therein be
"served on me at my office, No. 74 Broadway, in the
"City of New York.

"Dated July 21, 1875.

"Yours, &c.,

"JOHN CHETWOOD,

"*Att'y for Defendants.* 19

"To

"S. S. ROWLAND, ESQ.,

"*Att'y Plaintiff.*"

And deponent further says, upon his information and belief, and as appears from an examination of the records and files of papers on file in the office of the Clerk of the said Circuit Court of the United 20
States, in and for said Eastern District of New York, in the Second Circuit, no copy of the record in said action has at any time been filed or entered in the said Circuit Court of the United States, for the said Eastern District of New York, in said Second Circuit. Nor, as deponent is informed and believes, has the plaintiff in error, at any time caused its appearance to be entered in said Circuit Court in any manner or form. Nor, as deponent is also informed and believes, has the said plaintiff in error, or its attorneys or

21 agents, at any time taken or instituted any proceedings in said Circuit Court to compel the transmission of the record in said suit, or a copy thereof into said Circuit Court, pursuant to the provisions of the Statutes of the United States in such case made and provided, nor any proceedings whatever in said Circuit Court in said action.

That thereafter, and on or about the 3d day of August, in said year 1875, the said plaintiff in error caused to be made and served upon the attorney for
22 the defendant in error, their answer to the summons and complaint of the said defendant in error, in said Supreme Court of the State of New York, in and for the County of Kings, which said answer was duly sworn to by the agent of the said Steamship Company, claiming to be duly authorized, and which is fully set forth in the return to the writ of error herein.

And that thereafter, on or about the 17th day of September, 1875, the said attorney for the plaintiff in error, caused to be served upon the attorney for the defend-
23 ant in error, an affidavit of merits in said action, then pending in said Supreme Court of the State of New York, in and for the County of Kings, wherein the defendant in error herein was plaintiff, and the plaintiff in error was defendant, and which is in words and figures following, to wit:

"SUPREME COURT. 25

"CHARLES H. TUGMAN,
"*Plaintiff,*
"*against*
"THE NATIONAL STEAMSHIP COMPANY,
"*Defendant.*

Affidavit of Merits. 26

"*City and County of New York*, ss.:

"FRANCIS W. J. HURST, managing agent in the "United States, of the defendants in the above-enti- "tled action, being duly sworn, doth depose and say: "That he has fully and fairly stated the case in the "above action to John Chetwood, the defendant's "counsel in this action, who resides in Union County, 27 "N. J., and that it has a good and substantial defense "upon the merits thereof, as he is advised by its said "counsel, after such statement, made as aforesaid, "and verily believes to be true.

"F. W. J. HURST.

"Sworn to before me this
"3d day of August, 1875.

28

"ADAM GOS,

"*Notary Public,*

"N. Y. Co."

And on the back of said affidavit of merits, was a notice directed to the attorney of the said defendant in error, in words and figures following, to wit.:

29 "S. S. ROWLAND, Esq.,

"Attorney for Plaintiff:

"The within is a copy of an affidavit of merits, filed "in Kings County Clerk's office on the 4th day of "August, 1875.

"Dated September 16, 1875.

"Yours, &c.,

30

"JOHN CHETWOOD,

"*Att'y for Defendants.*"

That on or about the same date the said attorney for the said plaintiff in error caused to be served upon the attorney for the defendant in error a notice of trial in said action then pending in said Supreme 31 Court of the State of New York, for the County of Kings, in substance and effect that the issues of fact in said action would be brought to trial by the said plaintiff in error, and a motion made to "dismiss the "complaint therein, at a Circuit Court thereafter to "be held in and for the County of Kings, at the "Court House in the City of Brooklyn, on the first "Monday of October then next, at ten o'clock in the "forenoon of that day."

(Signed) JOHN CHETWOOD,

32 *Att'y for Defendant.*

"To S. S. ROWLAND, Esq.,
Att'y for Plaintiff."

That thereafter, and about the 20th of November, 1876, as appears by a notice and the written admission thereof in deponent's possession, S. S. Rowland, Esq., attorney for the defendant in error herein, caused to be served upon the said attorney

for the plaintfff in error herein, a similar notice of trial 33
of the issues joined in said action at a Circuit Court of the Supreme Court of the State of New York, for the County of Kings, for the first Monday of December then next, and that the attorney for the said plaintiff in error, then and there by a written admission in writing, endorsed on the back of said notice. "Admitted due and timely service of a copy of the " notice of trial.

"Dated November 20, 1876.

34

(Signed) "JOHN CHETWOOD,

"*Plaintiff's Attorney.*"

That subsequently thereto and on or about the 18th day of December, 1876, the attorney for the said defendant in error caused to be served upon the attorney for the said plaintiff in error, another notice of trial of the issues of fact, joined in said action at and for a Special Trial Term of the Circuit Court of the 35
said Supreme Court of the State of New York, in and for the County of Kings, to be held on the first Monday of January then next, due service of a copy of which said notice of trial was then and there admitted by endorsement in writing on the back of said notice by the attorney for said plaintiff in error, dated December 18, 1876, and signed "John Chetwood, Defendant's Attorney," as appears by the said notice and admission now in deponent's custody.

That the issues joined in said action in said Su- 36
preme Court of the State of New York, in and for the County of Kings, between the parties aforesaid, being thus duly noticed for trial by both parties, the said cause was placed upon the docket of said Court, in and for said County, and that thereafter and on or about the 16th day of January, 1877, the attorneys for the respective parties then mutually stipulated to refer all the issues joined in said action to Henry Nicoll, Esq., sole Referee, to hear and determine the same,

37 as appears by said stipulation, now on file in the office of the Clerk of said Supreme Court, in and for the County of Kings, in words and figures following, to wit:

"SUPREME COURT,

"KINGS COUNTY.

38

"CHARLES H. TUGMAN

"*against*

"THE NATIONAL STEAMSHIP

"COMPANY.

Defendant.

39

"It is hereby agreed, and we consent that an order "be entered in this action referring all the issues "therein to Henry Nicoll, Esq.

"Dated January 16, 1877.

"Signed, S. S. ROWLAND,

Plaintiff's Attorney.

"JOHN CHETWOOD,

40 *Defendant's Attorney.*

And that upon filing said stipulation an order was 41
entered referring said cause, and all the issues therein, to said Henry Nicoll, Esq., a true copy of which appears in the record of the return to the writ of error in this action.

That previous to the entering of said order, and some time during the year 1876, as appears by the entries and statements in the return to the writ of error herein, the attorneys for the respective parties in said action, then pending in said Supreme Court of the State of New York, for the County of Kings, 42
entered into a mutual stipulation in writing, consenting and agreeing that a commission be issued out of said Snpreme Court of the State of New York, and directed to Louis Fairchild, Esq., United States Consul for the Port of Liverpool, England, for the purpose of taking the deposition of one George Beedie, a clerk in the employ of the said National Steamship Company at Liverpool, and such other witnesses as might be produced by the respective parties.

That pursuant to such stipulation and agreement, a 43
commission was duly issued out of said Supreme Court, directed to the consul above-named, with interrogatories annexed, for the examination of the said George Beedie.

That pursuant to said commission and stipulation, the said George Beedie was duly examined as a witness in said action so pending in said Supreme Court of the State of New York, and his deposition taken in answer to the interrogatories thereto annexed, by and before said consul, on which said examination the said 44
National Steamship Company appeared, and was represented by its solicitor, Mr. William Stone, which said deposition was duly transmitted to the Clerk of the Supreme Court of the State of New York, in and for the County of Kings, and by and in pursuance of a mutual stipulation in writing of the respective attorneys, was afterwards duly opened and delivered to the attorney for the defendant in error, and used by him as evidence on the trial of said action before said Referee.

45 That the hearing before the said Referee commenced some time in February, and was concluded on or about the first of June, in the year 1877, and on, which hearing testimony was given, and proceedings had, as set forth in the return to the writ of error herein.

And deponent further says, that in addition to the proceedings in the return to the said writ of error, as appears by notice and admissions now in deponent's possession, in said action, several notices in writing
46 were served by the attorney for the defendant in error upon the attorney for the said plaintiff in error, requiring him to produce on the trial before said Referee diverse and sundry writings and evidence to be used on said trial, due service of copies of which said notices were admitted in writing by the attorney for the said plaintiff in error, as appears by such admissions now in deponent's possession.

That while said hearing and trial was pending before the said Referee, and on or about the 12th day of
47 April, 1877, the said attorney for the plaintiff in error procured from one of the Judges of the Supreme Court of the State of New York, in and for the County of Kings, and caused to be served upon the attorney for the defendant in error herein, an order to show cause in words and figures following, to wit:

"SUPREME COURT, 49

"KINGS COUNTY.

"CHARLES H. TUGMAN,
"*Plaintiff,*

"*against*

"THE NATIONAL STEAMSHIP COMPANY,
"*Defendant.* 50

"On the pleadings and proceedings in this action, "and on the affidavits of Francis W. J. Hurst and "John Chetwood, let plaintiff show cause before any "Justice of this Court at Special Term at Chambers, "in the Kings County Court House, at Brooklyn, on "the 14th day of April, instant, at 10:30 o'clock A. M., "why the defendants should not have an order giving "them leave to amend their answer setting up the de- "fense disclosed by such affidavits. And why they 51 "should not have such other relief as may be equit- "able and just. Meanwhile, and until the decision of "such motion, let further hearing before the Referee "be stayed.

"Dated, April 12, 1877.

"C. E. PRATT,
"*J. S. C.*"

52 Which said order was founded upon two affidavits presented to said Judge, one made and sworn to by F. W. J. Hurst, Esq., General Managing Agent of the said plaintiff in error, and the other by the Attorney for the said plaintiff in error, which said affidavits are in words and figures following, to wit.:

53 "SUPREME COURT.

"CHARLES H. TUGMAN,

"*against*

"THE NATIONAL STEAMSHIP COMPANY.

"*City and County of New York. ss.:*

54 "FRANCIS W. J. HURST, being duly sworn, on his "oath says, that he is the sole managing agent of the "defendants, who run a line of steamships between "New York and Liverpool, that the Erie and Pacific "Dispatch, an inland transportation line between New "York and Chicago, applied to defendants in October, "1874, for the rate at which they would take one "thousand tons of freight to be shipped from Chicago "to Liverpool during December, 1874, and January, "1875, ocean transportation by defendants' ships,
55 "giving defendants to understand that they had re- "ceived such an application from a person in Chicago "intending to ship.

"That defendants had been in the habit, as such "Dispatch Company well knew, of authorizing them to "make such contracts with actual shippers, and sup- "posing such to be the case in this instance, a rate "was named by defendants, which, as such Dispatch Company well knew, was only to be offered to an actual "*bona fide* shipper.

"That said 1,000 tons of freight, with a trifle excep-
56 "tion, were shipped by other people and not by the "plaintiff, that the ocean rate having risen, defendant "collected the excess on the other side, and refused to "account for it in any way to plaintiff, with whom they "supposed they had no contract, and to whom they "supposed they were under no liability.

"That on being sued by plaintiff they consequently "set up as their defense in the action a general denial.

"That since the action has been on trial before the "Referee deponent finds that a part of the defense

" consists in the fact that there was a fraudulent com- 57
" bination between the plaintiff and the Erie & Pacific
" Dispatch or its officers, to get improperly and by
" suppression of facts, from defendants, a rate of
" freight which would enable them to speculate at the
" expense of these defendants.

" That deponent himself has knowledge of facts and
" is prepared by other witnesses to prove facts which,
" as he is advised by his counsel, tend to establish a
" defense, by reason of the fraudulent acts and bad
" faith of the plaintiff in connection with the Erie & 58
" Pacific Dispatch and its officers, and that the same
" would be ruled out on the pleadings as they now
" stand.

" That it is only since the last hearing that deponent
" has been apprised of this condition of things, and he
" is anxious for leave to the defendants to amend their
" answer, that they may have the opportunity, as he
" believes he can, of establishing this defense.

" Defendants are a solvent corporation, with a paid
" up capital of several million dollars, and almost 59
" always a ship in the harbor worth at least half a mil-
" lion of dollars.

" F. W. J. HURST.

" Sworn to before me this }
April 12, 1877, }

" ADAM GOS,

" *Notary Public,*

" N. Y. Co."

60

61 " SUPRRME COURT.

" CHARLES H. TUGMAN,

against

" THE NATIONAL STEAMSHIP COMPANY

Defendants.

62 " *City and County of New York*, ss. :

" JOHN CHETWOOD, being duly sworn, on his oath, says that he is the attorney and counsel of defendants.

" That this action has been referred by consent to " Henry Nicoll, Esq., as sole Referee, to hear and de- " termine all the issues therein; that when deponent " was about to prepare the answer in this action, he " was so instructed and informed that he supposed the " plaintiff had no contract with or cause of action
63 " against the defendants; that plaintiff had no interest " in or was in any way privy to a certain freight con- " tract claimed to have been made with defendants in " October, 1874, and on which this action is based; " that deponent, under such instructions and belief, " prepared an answer containing a simple general de- " nial.

" That several hearings have been had before the " Referee on the issues as raised by the original plead- " ings, and the testimony for plaintiff was closed at the " hearing before the last.

64 " That when defendants came to offer their testi- " mony, deponent found that one of the defenses in " this action was a fraudulent combination between " the Erie and Pacific Dispatch, its officers or some " of them, and the plaintiff by false representations " and suppressions to get from defendants for the " benefit of themselves and in breach of the duty of " the said Erie and Pacific Dispatch, and its officers " and agents to the defendants, and also in fraud of " and to the prejudice of the defendants, the agree-

"ment to carry freight set forth in the complaint, and 65
"that the same was void by reason of such practices
"in obtaining said contract, and by reason of the
"fraudulent action of the plaintiff and said Erie and
"Pacific Dispatch, its officers and agents in connection
"therewith, and that testimony going to establish this
"defense could not be introduced as the answer now
"stands, against the objection of the plaintiff.

"JOHN CHETWOOD.

"Sworn to before me }
"this April 12, 1874. } 66

"ADAM GOS,

"*Notary Public*,

"N. Y. Co."

And deponent further says, that on the hearing of said order to show cause, such proceedings were had, that consequently an order was made by the said Su- 67
preme Court of the State of New York, in and for the County of Kings, granting leave to said plaintiff in error to make, and file and serve an amended answer in said action, setting up any other or additional matter of defence which it might desire, but without prejudice to the proceedings already had before the Referee, and continuing the case for trial before said Referee in respect to any new issues that might be raised by said amended answer.

And deponent further says, that the said plaintiff in 68
error did not avail itself of the leave granted and did not serve any amended answer in said action, but proceeded with the trial upon the original issues before said Referee.

And deponent further says, that after perfecting the judgment in said action in the Supreme Court of the State of New York, in the County of Kings, upon the report of the Referee therein, and after the perfecting of the appeal therefrom to the General Term of said

Supreme Court, upon the part of the plaintiff in error, as is fully set forth in the return to the writ of error herein, the attorney for the said plaintiff in error, caused due and timely notice of the argument, of the said Appeal before said Supreme Court, in accordance with the rules and practices of the said Supreme Court, and also admitted due service of a similar notice of argument of said appeal from the attorney of the defendant in error, and said appeal was argued pursuant to said several notices.

And that as deponent is informed and believes, after the perfecting of the appeal by the plaintiff in erroa, to the Court of Appeals of the State of New York from the judgment of affirmance therein by the said General Term of said Supreme Court, as is set forth in the return to the writ of error herein, the said attorney for the plaintiff in error, likewise caused to be served upon the attorney for the defendant in error, due and timely service of notice or argument of said appeal before said Court of Appeals, in accordance with the rules and practice of said Court, and also accepted and admitted service of a similar notice of argument from the attorney for the defendant in error, and the said appeal was argued in said Court of Appeals in pursuance of said respective notices.

And further saith not.

FREEMAN J. FITHIAN.

Subscribed and sworn to before me this 27th day of November, A. D., 1880.

JOHN FITCH,

U. S. Com'r, Southern Dist. of N. Y.

SUPREME COURT, 73

OF THE UNITED STATES.

THE NATIONAL STEAMSHIP COMPANY,

Plaintiff in Error,

against

CHARLES H. TUGMAN, 74

Defendant in Error.

Brief for Defendant in Error on motion herewith noticed for dismissal of the Writ of Error in this action or for affirmance of the judgment.

First.

On the argument of this motion the counsel for the 75
moving party will first present to the court a summary of facts in consecutive order, appearing from the moving papers.

Second.

The moving party on the argument of the motion will contend—

1. That the action and controversy in this case between the parties was not a case of which the Courts of the United States could take cognisance, 76
and that therefore this Court has no jurisdiction to entertain the writ of error or proceed thereon.

II. That the record and proceedings before this Court show no question or case arising under the constitution of laws of the United States, and that there is no Federal question of which this Court can take cognisance by writ of error or otherwise.

77 **Third.**

The moving party herein will further contend that even if it should appear that the Courts of the Unite l States had jurisdiction of the subject-matter in controversy between the parties to this action, such jurisdiction was concurrent with the jurisdiction of the Courts of the State of New York. And the plaintiff in Error (defendant below) had its election to submit itself to the concurrent jurisdiction of the State Courts,
78 or (if it could bring itself within the provisions of the Statutes of the United States in that regard) it could avail itself of these Statutes to remove the case to the proper Circuit Court of United States in the mode and manner prescribed by such Statutes.

And in these respects the counsel for the defendant in error will contend—

I. That the petition for the removal of the cause filed in the office of the Clerk of the Supreme Court of the State of New York, set forth in the return to
79 the writ of error herein, does not show upon its face that the plaintiff in error, was at the time of the commencement of this action, an alien to the United States, or a foreign citizen or subject.

And that said petition did not in other respects contain facts sufficient to authorize the removal of the said cause to the Circuit Court of the United States. and that therefore the Circuit Court of the United States for the Eastern District of New York, in the Second Circuit, did not obtain jurisdiction to entertain
80 or proceed to hear and determine the said action and controversy.

Fourth.

The moving party will further contend that if the petition referred to and the filing thereof in the office of the Clerk of the Supreme Court of the State of New York for the County of Kings, did have the effect to confer upon the aforesaid Circuit Court of the

United Stated for the Eastern District of New York. 81
some *quasi* or inchoate jurisdiction in the premises, no act was done by the said plaintiff in error or its attorneys, to perfect the said jurisdiction, or to cause or procure a transfer of the record or a copy thereof into the said Circuit Court of the United States, so that that Court could obtain any jurisdiction or authority to proceed thereon, nor was any proceedings had or taken in accordance with the provisions and conditions of the bond accompanying said petition

82

Fifth.

It was, therefore, in that stage of the case, in the power of the plaintiff in error, without any action or order of the said Circuit Court of the United States, to waive its right to invoke the jurisdiction of the said Circuit Court of the United States, and to remit itself and the matters in controversy to the jurisdiction and determination of the State Court by consent 83
and acquiescence.

Bacon's Abridgement, Title Courts, A,. Sec. B.
Overstreet vs. Brown, 4 McCord, 49.
Cleveland vs. Walsh, 4 Mass., 493.
Harrison vs. Remsen, Peter, C. C. R., 409.
Campbell vs. Cowen, Wright, 484.
Brown vs. Crow, Hardin, 448.
Bagley vs. Fitzhue, 2 Washington, 214. 84
Hogan vs. Baker, 2 E. D. Smith, 22.
Smith vs. Dispeer, 2 Code, R. 70.

1. Upon the principles of these authorities, therefore, when the plaintiff in error and its attorney wholly omitted to perfect its pleadings for the removal of the cause into the Circuit Court of the United States, and consented to and did interpose its sworn answer in the State Court, and thereafter, by its attorneys, consenting in writing that the matter in contro-

85 versy be referred for hearing and determination, to a Referee, an officer of the State Court, and also caused notice to be given on its part that it would bring the issues to trial before said Supreme Court, in and for the County of Kings, it did thereby, by these acts and acquiescences, consent to subject itself to the jurisdiction of the State Court, and did waive its right, under its former petition and bond, to proceed or have the case heard or determined in the Circuit Court of the United States, and it could not be heard to ob-
86 ject to the jurisdiction of the State Court after the trial had been commenced before the Referee, and a witness sworn for the plaintiff and partly examined, without objection.

See return to the writ of error, evidence of Tugman, the plaintiff.

For these reasons it is manifest upon the face of the
87 papers and proceedings, that the State Court had jurisdiction to hear and determine the matters in controversy in the said action.

And it being so, it is submitted that this Court will not assume jurisdiction to review any of the decisions made by, or proceedings had, in the State Court, but will dismiss the writ of error.

Sixth.

88

The moving party will also argue and claim, that upon all the facts above referred to, and the subsequent acts and proceedings on the part of the plaintiff in error, set forth in the record and the moving affidavits, it is manifest that the writ of error was taken for delay only, and that the question upon which the jurisdiction of this Court is made to depend by the plaintiff in error, is frivolous, and needs no further argument.

And on these grounds the moving party will move this Court, in case the writ of error is not dismissed, judgment of the State Court will be affirmed with costs, pursuant to the provisions of Rule 6 of the Rules of this Court, together with such further or other order or judgment in the premises as the Court may see fit to grant. 89

Dated November 27, 1880.

Yours, &c., 90

F. J. FITHIAN,

Att'y for defendant in error herein,

No. 57 Broadway, N. Y.

JAS. R. CARMICHAEL,

Att'y of Record for plaintiff in State Court,

No. 155 Broadway, N. Y. 91

92

93 SUPREME COURT

OF THE UNITED STATES.

THE NATIONAL STEAMSHIP COMPANY,

Plaintiff in Error,

against

94 CHARLES H. TUGMAN,

Defendant in Error,

Affidavt of Service.

STATE OF NEW YORK, *City and County of New York.* } ss.:

JAMES R. CARMICHAEL, of the City of Elizabeth, County of Union and State of New Jersey, being duly sworn, says: that he is twenty-one years of age and
95 upwards; that on the 27th day of November, A. D., 1880, at No. 74 Broadway, in the City of New York, he served true copies of the annexed original affidavit, notice of motion and the brief thereon, on John Chetwood, Esq., the attorney for the plaintiff in error herein, by handing to and leaving with him the said true copies thereof. Deponent further says, that said John Chetwood, Esq., admitted to him, that he was the attorney for plaintiff in error herein, and deponent knows him to be said Attorney.

96 JAS. R. CARMICHAEL.

Subscribed and sworn to before me this 29th day of November, 1880.

[SEAL.] EDWARD J. KUANER,

Notary Public,

Queens County.

Cert. filed in N. Y. Co.

SUPREME COURT 97

OF THE UNITED STATES.

THE NATIONAL STEAMSHIP COMPANY,
Plaintiff in Error,

against

CHARLES H. TUGMAN,
Defendant in Error.

Brief of Defendant in Error, on Motion to dismiss the writ of Error. 98

FIRST.

Summary of the facts appearing from the return to the writ of Error, and from the moving papers, supposed to be material, on the motion.

1st. The suit was commenced in the N. Y. Supreme Court, Kings County, about June 24th, 1875, 99
by service upon the defendant(Plaintiff in Error) by a summons and complaint.

2d. It was a special action on the case to recover for moneys alleged to have been collected and received by the Steamship Co., belonging to the plaintiff Tugman, and wrongfully withheld.

3d. Thereupon the Steamship Co. attempted to avail itself of the provisions of the act of Congress of 100
March 3d, 1875, for the removal of the cause unto the Circuit Court of the U. S.

It prepared its petition, setting forth among other things that it *then was* (July 13th, 1875) a citizen of Great Britain, and alien to the United States, and prepared and executed the bond required by the act. And upon these papers it applied to a Judge of the State Court sitting at Chambers, for an order of removal, which was

101 refused. And thereupon the papers were filed in the office of the Clerk of the State Court. And so far as the defendant in error or his attorneys and counsel have had any knowledge or notice or can ascertain, no further proceedings were had or taken by the Steamship Company to perfect or in any respect as to such attempted removal (see proceedings in Error Book about page 20,) but—

102 4th. The attorney of the Steamship Company immmediately caused to be served upon the attorney for plaintiff below, a general notice of retainer in the StateCourt (see motion papers, page 5, fol. 17), dated July 21, 1875.

5th. About August 3, 1875 the Steamship Company caused to be served a copy of its sworn answer to the complaint in the State Court (see answer in Error Book). And at the same time it
103 caused an "affidavit of merits" to be made and sworn by its managing agent and entitled in the State Court, and filed in the office of the Clerk of that Court, and a copy with notice thereof to be served on the attorney for the plaintiff (see moving papers, pages 7 and 8).

6th. The issues being thus joined, the cause was noticed for trial by the attorneys of both parties, for a Trial Term of the State Court, and was placed upon the trial docket, to be tried in
104 its order when reached (see moving papers, pages 8 and 9.

7th. That thereafter, and before the said cause was reached in its order on the docket of the State Court, the attorneys for the respective parties mutually stipulated for the issuing of a commission by the State Court, to take testimony in the said action in the city of Liverpool, and that such commission was issued and testimony

thereunder taken, both parties appearing by 105
counsel before the commissioner and the depositions returned to the clerk of the State Court, and by mutual consent of the counsel opened, and the depositions subsequently used as evidence on the trial before the Referee, without objection by either party.

8th. That about January 16th, 1877, the said cause being an the docket of the State Court for trial and reached in its order, the attorneys for the 106
respective parties, mutually stipulated in writing, to refer all the issues in said action to Henry Nicoll, Esq., sole Referee, to hear and determine the same (see moving papers, pages 9 to 13).

9th. That by consent of parties a day was fixed for the hearing before the said Referee, and the trial of the issues was commenced some time in February, 1877, and proceeded with from 107
time to time until the plaintiff had closed his proofs in that behalf.

10th. That thereupon, in April, 1877, the attorney for the Steamship Company applied to the State Court for an order permitting him to amend his answer in said Court, by setting up a new and independent defense, which application was based on a notice and affidavits, wherein it was set forth and alleged that the said action had been referred "*by consent*" to Henry Nicoll, 108
Esq., as sole Referee, to hear and determine all the issues therein. (See motion papers, pp. 12 to 19.

11th. That by consent of parties, leave was granted to the steamship Company to amend its answer any way it saw fit, providing said amendments should be without prejudice to the proceedings theretofore had before said Referee, and con-

109 tinuing the reference as to any new issues that might be raised by such amended answer. But the Steamship Company did not avail itself of the leave for an amendment granted, and proceeded before the Referee upon the issues already joined, thus indicating pretty clearly that its object was to delay and obstruct the plaintiff in the prosecution of the litigation by annulling all the previous trial and hearing before the Referee. (See moving papers, pp. 13 to 18.)

110

12th. This trial being concluded before the Referee, he made his report in favor of the plaintiff of the date of June 8, 1877. (See Error Book, about p. 12.

13th. Upon this report judgment was docketed against the Steamship Company for the amount found by the Referee, with costs, on the 27th of June 1877, in the office of the Clerk of the State Court. (See Error Book, in which these proceedings are set forth.)

111

14th. From this judgment the Steamship Company took and prosecuted several appeals. 1st to the General Term of the Supreme Court, and 2nd to the Court of appeals, regularly noticing said appeals for hearing and argument before the several appellate courts. On each of said appeals judgment entered upon the report of the Referee was affirmed, with costs. (See Error Book setting forth these proceedings.)

112

15th. The attention of this Court is respectfully invited to the fact, which appears from the opinions of the appelate courts of the State, that upon the argument of these several appeals the counsel for the steamship company asked for a reversal of the judgment entered upon the report of the Referee, not solely on the ground that

the State Court was without jurisdiction by reason of the alleged attempt to remove the case into the United States Court—but he also invoked the appellate jdrisdiction of these courts, and asked for a reversal of the judgment below on the ground of error in the rulings and determination of the Referee upon the *merits of the controversy.* 113

SECOND.

114

Assuming that none of the facts aforesaid can or will be contradicted by the plaintiff in error, we suppose the counsel for the Steamship Company can have only one single point before this Court, on this supposition, viz.: to the effect that exclusive jurisdiction had absolutely vested in the Circuit Court of the United States, and that it could not revest in the State Court without an order of remittitur from the United States Court.

We submit that upon the facts in the case such a pesition is wholly untenable in view of the fact that the State Court had original and co-ordinate jurisdiction over the subject matter of the action. 115

F. J. FITHIAN,
Att'y for Def't in Error herein.

JAMES R. CARMICHAEL,
Att'y of Record for P'ff in State Court,
No. 155 Broadway,
New York City. 116

18 U. S. St., 470.
95 U. S. St., 183.